86 - 1333

No.

In The

Supreme Court of the United States

October Term, 1986

NATIONAL ELEVATOR INDUSTRY, INC.,

Petitioner,

vs.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES O. STRAHLEY
Counsel of Record
MICHAEL T. McGRATH
PUTNEY, TWOMBLY, HALL
& HIRSON
Attorneys for Petitioner
The Bar Building
36 West 44th Street
New York, New York 10036
(212) 704-0300

5184
Bets Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

140 pp

QUESTIONS PRESENTED

This petition presents two important issues concerning the binding effect of a judgment confirming an arbitration award and dismissing a union's plenary action seeking a nationwide permanent injunction, in subsequent litigation between the same parties.

1. What is the preclusive effect of a judgment of a United States District Court confirming an arbitration award upholding the employer's right to reduce wage rates, in a subsequent action in which the union seeks to compel rearbitration of what the union concedes is the same issue between the same parties with no material factual difference?

2. What is the preclusive effect of a judgment of a United States District Court dismissing the union's complaint seeking a nationwide permanent injunction against wage rate reductions, in a subsequent action in which the union seeks to compel rearbitration of what the union concedes is the same issue between the same parties with no material factual difference?

STATEMENT PURSUANT TO RULE 28.1

Petitioner, National Elevator Industry, Inc. ("NEII") is a membership corporation organized under the laws of the State of New York. NEII is a trade association of employers engaged in the business of constructing, modernizing, repairing and servicing elevators, escalators, dumbwaiters, moving walkways and similar devices.*

---

* The names of the employers which are members of NEII, and their parent organizations, affiliates and/or subsidiaries, if any, are shown below:

Name of NEII Employer	Type Of Organization	Parent Corporation If Any	Affiliates and/or Subsidiaries
Alimak, Inc.	Corporation	Alimak Ab Sweden	None
Armor Elevator	Corporation	Kone Corporation	None
Bay State Elevator Co., Inc.	Corporation	None	None
Beckwith Elevator Co., Inc.	Corporation	None	None
Capital Elevator Service Co.	Corporation	Elevator Enterprises, Inc.	Elevators, Inc.
Carter Elevator Co., Inc.	Corporation	None	Lifters, Ltd.
Courion Industries, Inc.	Corporation	None	None
Dover Elevator Company	Corporation	Dover Elevator International	Lagerquist & Sons, Inc.

(Cont'd)

(Cont'd)

Name of NEII Employer	Type Of Organization	Parent Corporation If Any	Affiliates and/or Subsidiaries
			Miami Elevator Company Sound Elevator Company
Eastern Elevator Co., Inc.	Corporation	None	None
Elevators, Inc.	Corporation	Elevator Enterprises, Inc.	Capital Elevator Service Company
ESCO Elevators, Inc.	Corporation	None	None
Fujitec America, Inc.	Corporation	Fujitec Co., Ltd.	None
Gallagher Elevator Co., Inc.	Corporation	None	None
General Elevator Company, Inc.	Corporation	None	Consolidated Elevator Company, Inc.
Grindel Elevator Co.	Partnership	None	None
Hardwick Elevator Co., Inc.	Corporation	None	Hardwick Elevator Service
Hollister Whitney Elevator Corp.	Corporation	None	G.A.L. Manufacturing
Independent Elevator Company	Corporation	None	None

(Cont'd)

(Cont'd)

Name of NEII Employer	Type Of Organization	Parent Corporation If Any	Affiliates and/or Subsidiaries
Lagerquist & Sons, Inc.	Corporation	Dover Elevator International	Dover Elevator Company Miami Elevator Company Sound Elevator Company
Lamps Elevator Sales and Service, Inc.	Corporation	None	None
Marshall Elevator Co.	Corporation	None	Marshall Electronic Division
D.A. Matot, Inc.	Corporation	None	None
Geo. T. McLauthlin Co. d/b/a McLauthlin Elevator Co.	Corporation	None	None
McNally Elevator Company, Inc.	Corporation	None	None
Midstate Elevator Co., Inc.	Corporation	None	None
Montgomery Elevator Company	Corporation	None	Montgomery-Cone Joint Venture Desaulniers & Co. Daniels Foods
National Elevator Corporation	Corporation	None	None
O'Keefe Elevator Company, Inc.	Corporation	None	None

(Cont'd)

(Cont'd)

Name of NEII Employer	Type Of Organization	Parent Corporation If Any	Affiliates and/or Subsidiaries
Otis Elevator Company	Corporation	United Technologies Corporation	Elco Elevator, Inc.
F.S. Payne Co.	Corporation	None	None
Powers Elevator Company	Corporation	None	None
Rossborough Elevators, Inc.	Corporation	None	None
Schindler Elevator Corporation	Corporation	Schindler Holding, AG	None
Schumacker Elevator Co., Inc.	Corporation	None	None
Sedgwick Lifts, Inc.	Corporation	The Peele Co.	Richmond Fireproof Door Division
Seelar & Co. Elevators	Partnership	None	Seelar Elevator Manufacturing
Serge Elevator Co., Inc.	Corporation	None	None
Westinghouse Elevator Company	Unincorporated division of a corporation	Westinghouse Electric Corporation	Adams Elevator Equipment Co. American Elevator Company Atlanta Elevator Erectors

(Cont'd)

(Cont'd)

Name of NEII Employer	Type Of Organization	Parent Corporation If Any	Affiliates and/or Subsidiaries
			Consolidated/ Standard Elevator Co.
			Continental Elevator Service Co.
			Eastern Engineering & Elevator Co.
			Elevator Products Corporation
			Emco-Taylor Elevator Company
			Houston El/ ator Company
			Ledermann Elevator Company
			Millar Elevator of Chicago, Inc.
			Millar Elevator Industries
			O. Thompson Company
			S&N Elevator Company
			Consolidated/ Standard Elevator Co.
			United-Western Elevator Company
			Westinghouse Canada Inc.

(Cont'd)

(Cont'd)

Name of NEII Employer	Type Of Organization	Parent Corporation If Any	Affiliates and/or Subsidiaries
Wilson Elevator Co., Inc.	Corporation	None	None

TABLE OF CONTENTS

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Page

Contents

Contents

Contents

Page

APPENDIX

Contents

No.

In The

Supreme Court of the United States

October Term, 1986

NATIONAL ELEVATOR INDUSTRY, INC.,

Petitioner,

vs.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

On November 13, 1986, the United States Court of Appeals for the Fifth Circuit entered an unpublished opinion which affirmed the order of the United States District Court for the Southern District of Texas, dated April 17, 1986, granting respondent's motion for summary judgment and denying petitioner's motion for summary judgment (1a). 806 F.2d 259. The District Court's opinion is unreported (3a).

JURISDICTION

This Court has jurisdiction of the instant petition by virtue of 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on November 13, 1986. Accordingly, this petition is timely filed. 28 U.S.C. § 2101(c).

STATUTES INVOLVED

This case involves Sections 203(d) and 301(a) of the *Labor Management Relations Act,* 29 U.S.C. § 173(d) and § 185(a). Section 203(d) provides in relevant part as follows:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 185(a) provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

I. Introduction

This is the second time in less than two years that the same

parties are before this Court on a petition for a writ of certiorari on related issues. This petition presents the important issue of whether the Fifth Circuit accorded the appropriate preclusive effect to the judgment of the United States District Court for the Southern District of New York, as affirmed by the United States Court of Appeals for the Second Circuit. *See International Union of Elevator Constructors v. National Elevator Industry, Inc.*, 590 F. Supp. 1218 (S.D.N.Y. 1984), *affirmed on opinion below*, 760 F.2d 253 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 67 (1985). In order for the Court to address the merits of this petition which concerns the preclusive effect of that prior judgment, the prior litigation and its background must be reviewed.

II. Parties and Collective Bargaining Agreement

Petitioner, National Elevator Industry, Inc. ("NEII") is a multi-employer trade association which represents for purposes of collective bargaining approximately 39 employers engaged in the business of constructing, modernizing, repairing and maintaining elevators, escalators, and related products for third-party customers such as building owners and building contractors throughout the United States.[1]

The International Union of Elevator Constructors ("IUEC") is an international labor organization duly authorized to negotiate a collective bargaining agreement with NEII with respect to the wages, hours and working conditions of the elevator mechanics and helpers employed by the employers represented by NEII throughout the United States.

---

1. NEII's employer-members, their parents, subsidiaries and affiliates are listed at page ii. NEII's only affiliate is the Elevator Manufacturers' Association of New York, Inc., itself a trade association comprised of some but not all the employer-members of NEII.

There has been a long series of collective bargaining agreements between NEII and the IUEC, dating back more than 60 years. These agreements are called by the parties the Standard Agreement because they govern the wages, hours and working conditions of said employees in every state of the United States (15a-17a).

The Standard Agreement is an agreement between NEII and the IUEC. All of the employer-members of NEII are bound by the Standard Agreement, as are all of the local unions of the IUEC. Thus, in the elevator industry, there is a single, nationwide collective bargaining unit with a single collective bargaining agreement covering the wages, hours and working conditions on a nationwide basis (15a-17a).

The Standard Agreement is a five-year agreement. It does not establish a single wage rate for the employees subject to the agreement. Rather, it establishes a formula by which wage rates are to be determined on a local-by-local basis. In broad terms, that formula provides that the wage rate of the elevator constructors in a given locality is to be based upon the wage rates of the other major building trades in the same locality, taking into account the cost of fringe benefits for the other trades as well as the fringe benefits for the elevator constructors. *See IUEC v. NEII*, 590 F. Supp. 1219 n. 2. Thus, the elevator mechanics' wage rate will vary from local to local but the method of computing that wage rate is a formula which is to be applied uniformly on a nationwide basis (18a-20a, 32a-37a).

Article XV of the Standard Agreement provides for arbitration, before an impartial arbitrator, of "All differences and disputes regarding the application and construction of" the Standard Agreement. Article XV, paragraph 2 provides that "The decision of the impartial arbitrator shall be final and binding on all parties" (37a-41a).

III. The Prior Litigation Between the Parties

A. The IUEC's Motion for a Preliminary Injunction

In August, 1983, the IUEC demanded arbitration of a dispute whether under the terms of the Standard Agreement, the wage rate of the elevator mechanic could be reduced in the event the average wage rate of the other building trades declined. Simultaneously, the IUEC commenced an action against NEII in the United States District Court for the Southern District of New York (Civil File No. 83-6064). In its complaint, the IUEC sought a preliminary and permanent injunction against the proposed wage reduction in Cedar Rapids or "*in any other location in the United States*" (48a; emphasis added).[2]

The IUEC moved for a temporary injunction to enjoin a wage decrease in Cedar Rapids or elsewhere in the United States, pending arbitration of the dispute as to the interpretation of the wage formula. After reviewing written submissions by the parties and hearing argument of counsel, the Hon. Mary Johnson Lowe, in an unpublished order, denied the IUEC's motion for a temporary injunction (50a).

B. The Cedar Rapids Arbitration

The parties proceeded to arbitration. On April 23, 1984, Arbitrator Stephen Goldberg rendered an opinion and award (51a-79a). Arbitrator Goldberg held that NEII had properly interpreted the wage formula under the Standard Agreement. Arbitrator Goldberg held that the wage rate of the elevator

---

2. The specific venue of the dispute was Cedar Rapids, Iowa where NEII had given notice that the wage rate of the elevator constructors would be reduced because of a decline in the average wage rate of the other building trades in that local (20a-21a).

mechanic should be reduced under the formula if the average wage rate of the other trades in a given local declined (*id.*).

C. Judicial Confirmation of the Award and the Litigation With Respect to the IUEC's Attempt to Obtain a Permanent Injunction Against the Reduction of the Wage Rate Anywhere in the United States

After issuance of Arbitrator Goldberg's opinion and award, NEII moved in the pending action in the United States District Court for the Southern District of New York (1) to confirm the award and (2) for judgment dismissing the IUEC's complaint for a permanent injunction against wage reductions in Cedar Rapids or in any other city of the United States. The IUEC cross-moved (1) to vacate the award and (2) for summary judgment on its complaint for a permanent, nationwide injunction against wage decreases.

In a published opinion, the Hon. Gerard L. Goettel granted NEII's motion to confirm the Goldberg award. *International Union of Elevator Constructors v. National Elevator Industry, Inc.*, 590 F. Supp. 1218 (S.D.N.Y. 1984). Judge Goettel initially declined to rule on the remaining motions before him. *Id.* at 1218 fn. 1. However, Judge Goettel reconsidered and ruled upon the motions before him, as described above. Judge Goettel entered the following judgment:

> NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED that
>
> 1. Plaintiff's motion to vacate said arbitration award be and hereby is DENIED.
>
> 2. Plaintiff's motion for summary judgment in this action be and hereby is DENIED.

3. Defendant's motion to confirm said arbitration award be and hereby is GRANTED.

4. *Because said arbitration award has been confirmed, the plaintiff's complaint be and hereby is DISMISSED.*

(81a; emphasis added).

The IUEC appealed from that judgment to the United States Court of Appeals for the Second Circuit. In an unpublished opinion, the Second Circuit affirmed the judgment "substantially for the reasons stated in the opinion of Judge Goettel." 760 F.2d 253 (2d Cir. 1985). The IUEC's petition for a writ of certiorari was denied. 106 S. Ct. 67 (1985).

IV. Wage Reductions in Other Cities During the Pendency of the Litigation Concerning the Goldberg Arbitration

While the arbitration was pending and during the litigation before the United States District Court for the Southern District of New York, wage reductions occurred on fifty-five (55) occasions throughout the United States, with more than one reduction occurring in certain locations. In implementing these wage reductions, NEII applied the formula to each of these other cities in precisely the same manner as Arbitrator Goldberg had found to be correct and proper. The IUEC did not demand arbitration concerning any of these wage decreases. Instead, when NEII initiated these wage reductions the IUEC wrote letters to NEII clearly indicating that the validity of the wage reductions in these other cities would be determined by the final outcome of the litigation described above (26a-27a).

V. The Instant Litigation

A. The Reduction in Wage Rates in Houston and Dallas, Texas in 1985

In March and May, 1985, NEII reduced the wage rates of the elevator mechanics in Houston and Dallas, Texas respectively. It is undisputed that NEII made these changes by applying the wage rate formula in Houston and Dallas in precisely the same manner that Arbitrator Goldberg had held to be proper and correct in his opinion and award. The IUEC then filed separate demands for arbitration, one demand for arbitration of the wage rate change in Houston and a second demand for arbitration of the wage rate change in Dallas (27a).

B. NEII's Action in the United States District Court for the Southern District of Texas

In response to the IUEC's two demands for arbitration, NEII commenced an action in the United States District Court for the Southern District of Texas seeking a permanent stay of both arbitrations. The grounds for NEII's application were as follows: (1) the issue sought to be arbitrated in Houston and Dallas was the same issue already determined by Arbitrator Goldberg in Cedar Rapids and, pursuant to the Standard Agreement, that award is "final and binding" on the parties; (2) the judicial confirmation of Arbitrator Goldberg's award barred rearbitration of the same issue in Houston or Dallas because a second arbitrator could not overrule Judge Goettel's holding that the Goldberg award drew its essence from the Standard Agreement; and (3) the District Court's judgment dismissing the IUEC's plenary action seeking a permanent, nationwide injunction against similar wage reductions, which judgment was entered because of the confirmation of the Goldberg award, barred rearbitration of the same issue in Houston and Dallas (14a-30a, 84a-95a).

The IUEC filed an answer and counterclaim seeking to compel arbitration. The IUEC admitted that it did not seek to rearbitrate the same dispute in Houston and Dallas because of any material difference between the issue actually arbitrated in Cedar Rapids and the issue sought to be arbitrated in Houston and Dallas. Rather, the IUEC admitted that it sought rearbitration of the same dispute, relying solely on decisional authority holding that the *stare decisis* or *res judicata* effect of a prior arbitration award between the same parties is itself an issue for arbitration.[3]

---

3. In its brief in support of its motion for summary judgment the IUEC stated:

> At the outset, we want to make it clear to the Court what we are *not* contending in this case. First, we are not contending that the Cedar Rapids wage reduction was made under a different agreement from the Houston and Dallas wage reductions. They were all made under the same collective bargaining agreement, the Standard Agreement, which contains a formula for determining wage rates at Article V, as discussed above. Second, while the wage determination made for Dallas does contain an issue that was not present in the Cedar Rapids case (which NEII apparently concedes is arbitrable), we are not claiming, that issue aside, that the wage reductions were made in a manner differently from that implemented in Cedar Rapids, the subject of Arbitrator Goldberg's decision. We state this now because we do not wish to mislead the Court into believing that the basis for our opposition to NEII's motion is the claim that we are dealing with different kinds of cases from that at issue in Cedar Rapids. Third, despite assertions made in papers filed on behalf of Locals 21 and 31 seeking to intervene, the IUEC itself does not raise "irregularities" in the Cedar Rapids case as a basis for contesting the employers' claim in this case. Rather, our position is grounded primarily in the applicable federal law governing arbitration. [Emphasis in original.]

C. Decisions Below

The IUEC and NEII both moved for summary judgment. On April 17, 1986, the Hon. James DeAnda issued an unpublished memorandum and order wherein he granted the IUEC's motion for summary judgment compelling arbitration and denied NEII's motion for summary judgment.

NEII appealed from Judge DeAnda's decision to the United States Court of Appeals for the Fifth Circuit which affirmed, in an unpublished opinion, "for the reasons assigned in the district court's order of April 17, 1986" (1a-2a). 806 F.2d 259 (1986).

VI. Considerations Warranting Review on Certiorari

Judge Goettel's confirmation of the Goldberg award and his dismissal of the IUEC's plenary action because of that confirmation, as affirmed by the Second Circuit, should have been accorded preclusive effect by the United States District Court for the Southern District of Texas and the Fifth Circuit on the IUEC's attempts to compel rearbitration of the same issue.

The Fifth Circuit's summary affirmance of Judge DeAnda's order creates a conflict between that Circuit and the Fourth and Eleventh Circuits as to the preclusive effect of a judicially confirmed arbitration award on the unsuccessful party's attempt to compel rearbitration. More importantly, it creates a conflict between the Fifth and Second Circuits as to the specific preclusive effect of the judicially confirmed, Goldberg award.

The Fifth Circuit's failure to accord preclusive treatment to the judicially confirmed award allows the IUEC to mount an impermissible collateral attack (1) on the Goldberg award in contravention of the principles announced by this Court in the

Steelworkers Trilogy[4]; (2) on Judge Goettel's express holding that the Goldberg award drew its essence from the collective bargaining agreement; and (3) on Judge Goettel's judgment dismissing the IUEC's action for a nationwide injunction against wage reductions anywhere in the United States.

Petitioner submits that the foregoing constitute sufficient circumstances warranting review on certiorari under Rule 17.1(a) & (c) of the Supreme Court Rules.

VII. Events Occurring Subsequent to the Fifth Circuit's Decision Which Have a Bearing on this Petition

Following Judge DeAnda's decision granting the IUEC's motion to compel arbitration, NEII moved to stay that order pending appeal. Judge DeAnda denied that motion.

On October 14 and 15, 1986, hearings were held before Arbitrator Howard LeBaron concerning the Dallas grievance. On December 29, 1986, after being apprised of the Fifth Circuit's summary affirmance of Judge DeAnda's order, Arbitrator LeBaron rendered his opinion and award. Arbitrator LeBaron expressly held, contrary to Judge Goettel and the Second Circuit, that Arbitrator Goldberg's award did *not* draw its essence from the Standard Agreement. Because he so found, Arbitrator LeBaron concluded that he was not bound by the prior award. Arbitrator LeBaron then proceeded to hold, contrary to Arbitrator Goldberg, that the wage rate formula of the Standard Agreement was not susceptible of an interpretation permitting wage reductions and, accordingly, he sustained the IUEC's grievance.

---

4. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Copr.*, 363 U.S. 593 (1960).

The IUEC has commenced an action in the United States District Court for the Northern District of Texas to confirm the LeBaron award (Civil Action No. CA3-87-0049-D). NEII has answered and counterclaimed to vacate that award. There has been no decision, as yet, in that litigation.

An arbitrator has been selected to hear the Houston grievance but no hearing has yet been held on that grievance.

REASONS FOR GRANTING THE WRIT

I.

Introduction

The seminal authority with respect to the manner which a District Court should decide (1) a motion to compel arbitration under a collective bargaining agreement or (2) a motion to confirm an arbitration award is the *Steelworkers'* Trilogy (*supra,* n. 4).

In the *Steelworkers* Trilogy, two of the decisions concerned actions brought by the Steelworkers Union to compel employers to arbitrate disputes under a collective bargaining agreement. *Steelworkers v. American Manufacturing Co., supra; Steelworkers v. Warrior & Gulf Navigation Co., supra.*

The third case in the *Steelworkers* Trilogy was an action brought by the Steelworkers Union to confirm an award in an arbitration which had already been conducted. *Steelworkers v. Enterprise Wheel & Car Corp., supra.* Out of these three cases, this Court forged a single federal policy: the policy of encouraging the final resolution of labor disputes through arbitration.

Thus, where a union or an employer seeks to compel arbitration of a dispute arising under a collective bargaining

agreement, the District Court should "resolve all doubts in favor of arbitration" and order the parties to proceed to arbitration. *Steelworkers v. Warrior & Gulf Co., supra* at 583. And, where the dispute has already been arbitrated by the parties, the federal policy enunciated in the *Steelworkers* Trilogy militates in favor of upholding the validity of the award, as this Court did in *Steelworkers v. Enterprise Wheel & Car Corp., supra.*

Last term, this Court restated and reaffirmed the principles originally set out by the Court in the *Steelworkers* Trilogy. *AT&T Technologies, Inc. v. Communications Workers of America,* ____ U.S. ____, 106 S. Ct. 1415 (1986).

Although the Court expressly reaffirmed the principles enunciated in all three cases comprising the trilogy, the issues actually before the Court in *AT&T Technologies v. Communications Workers* were limited to the issues discussed in only the first two cases of the trilogy. *Steelworkers v. American Mfg. Co., supra; Steelworkers v. Warrior & Gulf Navigation Co., supra.* The principles stated in *Steelworkers v. Enterprise Wheel & Car Corp., supra,* concerning the judicial enforcement of labor arbitration awards, were not discussed in *AT&T Technologies v. Communications Workers, supra.*

In *Steelworkers v. Enterprise Wheel & Car Corp., supra,* this Court set out the appropriate scope of the review to be conducted by a court when called upon to enforce an arbitration award. This Court held that the award could be confirmed "only so long as it draws its essence from the collective bargaining agreement". *Id.* at 597. Judge Goettel applied this test in his review of the Goldberg award and held that that award should be enforced because it drew its essence from the Standard Agreement. 590 F. Supp. at 1220.

NEII submits that the Fifth Circuit's summary affirmance

of Judge DeAnda's order permits the IUEC to undertake a collateral attack on that prior, judicially confirmed arbitration award and thereby significantly undermines the principles set out in *Steelworkers v. Enterprise Wheel & Car Corp., supra.* NEII submits that the instant petition raises substantial issues concerning the finality and preclusive effect of a judicially confirmed labor arbitration award. The petition also presents additional issues as to the preclusive effect of one District Court's final judgment in subsequent litigation before a different District Court, between the same parties on the same issue and with no material factual differences.

II.

Preclusive Effect of the Judicially Confirmed Arbitration Award

The recipient of an unfavorable arbitration award generally has a choice of *fora* in which to challenge that award. The unsuccessful party may challenge the award by asking a court of competent jurisidiction to deny enforcement of the award. In such a case, that court must apply the test enunciated in *Steelworkers v. Enterprise Wheel & Car Corp. supra.*

On the other hand, the unsuccessful party may choose to challenge the award in a subsequent arbitration.[5] The second arbitrator will then be called upon to determine the precedential effect of the prior award by interpreting the finality provisions of the collective bargaining agreement. *W.R. Grace & Co. v. Rubber Workers Union 759*, 461 U.S. 757, 762 (1983). A

---

5. *But see, Oil, Chemical & Atomic Workers Int'l v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981) (where award prohibits like violations, losing party may not render arbitration process meaningless by forcing victor to repeat process; instead, court may specifically enforce the award against post award conduct by the losing party).

subsequent judicial challenge to the second arbitrator's award will, of course, be determined under "the well-established standards for the review of labor arbitrations" found in *Steelworkers v. Enterprise Wheel & Car Corp., supra. W.R. Grace & Co. v. Rubber Workers, supra* at 764.

The effect of the Fifth Circuit's summary affirmance herein is that the IUEC is permitted to challenge an award in a second arbitration even though that award was judicially confirmed. Clearly, this is contrary to the intent of *Steelworkers v. Enterprise Wheel & Car Corp., supra;* and *W.R. Grace & Co. v. Rubber Workers, supra.*

This Court has never held that the unsuccessful party in arbitration is entitled to "two bites of the apple" to challenge the award through a direct judicial appeal and, after obtaining an adverse ruling from the court, to then collaterally attack the award in a subsequent arbitration. Indeed, research has disclosed no case, other than the instant case, which has allowed such a result.

This Court has consistently held that where the issue before the arbitrator is solely one of contract interpretation which does not involve individual, statutory rights, the arbitrator's award will be given preclusive effect in a subsequent attempt to relitigate the same dispute. *See Del Costello v. Teamsters,* 462 U.S. 151, 164 (1982) (discussing preclusive effect of an award on an employee's subsequent breach of contract claim); *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976) (holding that the award has preclusive effect in employee's subsequent breach of contract claim unless the award was tainted by union's breach of duty of fair representation).[6]

---

6. Where the subsequent litigation seeks vindication of an individual, statutory right, an *unreviewed* arbitration award enjoys no preclusive effect. (Cont'd)

As this Court stated in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 736 (1981) "courts ordinarily defer to collectively bargained dispute-resolution procedures when the parties' dispute arises out of the collective bargaining process."

In the instant case, no individual, statutory rights are in issue. The issue presented to Arbitrator Goldberg was entirely a contractual one. He rendered his opinion and award based upon the language of the Standard Agreement and the history of that agreement. Under the Standard Agreement that award is "final and binding on all parties" (39a). *Steelworkers v. Enterprise Wheel & Car Corp., supra; Barrentine v. Arkansas - Best Freight Systems, Inc., supra; W.R. Grace & Co. v. Rubber Workers, supra.*

In spite of the judicial confirmation of the Goldberg award, the IUEC maintains that it may now submit the same dispute to another arbitrator. The sole basis for the IUEC's assertion is the maxim that the precedential effect of a *prior award* is, itself, an issue for arbitration. *See e.g., New Orleans Steamship Ass'n v. General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980) *aff'd on different grounds, sub nom, Jacksonville Bulk Terminals Inc. v. International Longshoremen*, 457 U.S. 702, 707 n.5 (1982).

(Cont'd)

McDonald v. City of West Branch Michigan, 466 U.S. 284 (1984) (unreviewed award does not bar Section 1983 action); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (unreviewed award does not bar *Title VII* action); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (unreviewed award does not bar wage claim under *Fair Labor Standards Act*). *See also, Metropolitan Edison Co. v. NLRB*, 460 U.S. 893 (1983) (arbitral awards interpreting contract insufficient to constitute a waiver of statutory rights). This Court has not yet addressed the preclusive effect of a *judicially confirmed* award in subsequent litigation involving individual, statutory rights or otherwise. *But, see, Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (judicially confirmed administrative determination bars Title VII action); *University of Tennessee v. Robert Elliott*, ____ U.S. ____, 106 S. Ct. 3220 (1986) (unreviewed administrative determination does not bar *Title VII* action).

The IUEC's position ignores the judicial confirmation of the Goldberg award. Here, it is not the *precedential* effect of a prior award which is in issue as was the case in *W.R. Grace & Co. v. Rubber Workers, supra*, and the cases relied upon by the IUEC. Rather, it is the *preclusive* effect of a federal court judgment. It is axiomatic that it is for the court and not the arbitrator to determine whether a federal court judgment precludes arbitration.[7]

Judge DeAnda declined to give preclusive effect to Judge Goettel's judgment because he concluded that the Goldberg award was limited in its scope to the resolution of the grievance in Cedar Rapids. Judge DeAnda held that since the scope of the award was limited to Cedar Rapids, Judge Goettel's judgment confirming that award was similarly limited (8a-9a). NEII submits that Judge DeAnda erred in concluding that Goldberg's award was limited to Cedar Rapids.[8]

---

7. The preclusive effect of a prior federal court judgment on a subsequent action in federal court is determined by applying the federal common law. The court may draw upon such sources as the United States Constitution, (Full Faith and Credit Clause) and the *Full Faith and Credit Statute*, 28 U.S.C. § 1738 in formulating the rules of preclusion to apply in federal court. *University of Tennessee v. Robert Elliott, supra*. An arbitrator has no peculiar expertise to interpret or apply the law; indeed, if his award is based solely upon his personal view of the law, it will not be enforced by the court. *Steelworkers v. Enterprise Wheel & Car Corp., supra* at 597-598. Thus, whether a prior federal court judgment bars a court from compelling arbitration is an issue for judicial determination. *See Hudson-Berlind Corp. v. Local 807, International Brotherhood of Teamsters*, 597 F. Supp. 1282, 1285-1286 (S.D.N.Y. 1984). The issue is akin to the determination of whether a dispute is arbitrable under a collective bargaining agreement which is for the court to determine. *AT&T Technologies Co. v. Communications Workers, supra; Steelworkers v. Warrior & Gulf Navigation Co., supra.*

8. "The grant of summary judgment by a district court is subject to *de novo* review [by an appellate court]." 6, Part 2, *Moore's Federal Practice*, ¶ 56.27[1] supp. at p. 167 (footnote omitted). *See Matsushita Electric Industrial Co. LTD v. Zenith Radio Corp.*, ___ U.S. ___, 106 S. Ct. 1348 (1986); *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S. Ct. 2548 (1986). Thus, the District Court's conclusions are not binding upon this Court.

Judge DeAnda's holding as to the scope of Goldberg's award suffers from an inherent inconsistency. Judge DeAnda correctly found that the broad, nationwide issue of contract interpretation was submitted to Arbitrator Goldberg and that Arbitrator Goldberg's rationale is based upon the interpretation of the Standard Agreement as it applies nationwide (6a-7a). Solely because Arbitrator Goldberg chose to mention the venue of the dispute, Judge DeAnda incorrectly concluded that the scope of the award was limited to Cedar Rapids, Iowa (*id.*).

Judge DeAnda stated that he was constrained to "interpret the arbitrator's decision literally and enforce it mechanically" (6a). NEII submits that this is an erroneous statement of the law. In determining whether to enforce an arbitrator's award, the Court must determine what issue was presented to and decided by the arbitrator. *Steelworkers v. Enterprise Wheel & Car Corp., supra.* There is nothing in *Steelworkers v. Enterprise Wheel & Car Corp., supra*, to suggest that the "literal/mechanical test" applied by the court below is appropriate for determining the scope of the arbitrator's award.[9]

---

9. Indeed, Judge DeAnda disregarded Fifth Circuit precedent, indicating that the test is far broader. "The issues submitted to an arbitrator, or the grievance itself when no submission agreement is used, define the limits of the arbitration award." *Oil Chemical & Atomic Workers v. Rohm & Haas, Texas, Inc.*, 677 F.2d 492, 493 (5th Cir. 1982) *citing, Piggly Wiggly Operators Warehouse, Inc. v. Piggly Wiggly Operator's Warehouse Independent Truckdrivers Union Local No. 1*, 611 F.2d 580 (5th Cir. 1980).

There is nothing in Arbitrator Goldberg's opinion to suggest that he was deciding less than the entire grievance which was submitted to him. The IUEC submitted a broad, nationwide grievance to arbitration (87a-91a). Arbitrator Goldberg's award reads "The grievance is denied" (51a). Thus, the scope of Arbitrator Goldberg's award is as broad as the grievance which was submitted to him. *Id.*

In the instant case, the Goldberg award expressly authorizes specific conduct by NEII, to wit: The reduction of wages pursuant to the wage rate formula contained in the Standard Agreement. Consequently, the Goldberg award is inherently prospective in nature in that Arbitrator Goldberg was called upon to, and did in fact, decide a broad issue of contract interpretation. *See Baldwin Piano & Organ v. International Chemical Worker's Union*, 564 F. Supp. 1262 (N.D. Miss. 1983).

There is no allegation by the IUEC that there are "intervening changes in facts which are arguably significant" so as to warrant a different conclusion. *United Paperworkers v. Georgia Pacific Corp.*, 798 F.2d 172, 173 (6th Cir. 1986). The IUEC expressly disavows any such material, factual distinctions between the facts presented to Arbitrator Goldberg and those in issue in Houston and Dallas. (*See, supra*, n. 3.)

In the instant case, there is a final, federal court order confirming an arbitration award. Such a court order is final and is binding on the parties. *Steelworkers v. Enterprise Wheel & Car Corp., supra; Barrentine v. Arkansas-Best Freight Systems, Inc., supra; Kremer v. Chemical Construction Corp., supra.*

Judge Goettel's holding that Arbitrator "Goldberg quite properly looked to the history of the agreement and found that the use of the word 'increase' was not in any way intended to bar decreases" as well as his ultimate holding that the Goldberg award "draws its essence" from the Standard Agreement (590 F. Supp. at 1220) are binding upon the parties. The IUEC's attempt to obtain a second and third arbitration of what is concededly the same dispute, is an impermissible collateral attack on that award and the judgment of the federal court confirming the award. Judge DeAnda and the Fifth Circuit erred in permitting such an attack. This Court should grant certiorari and reverse.

III.

Dismissal of the IUEC's Plenary Action on the Basis of the Judicially Confirmed Award

The IUEC's action in the United States District Court for the Southern District of New York seeking a nationwide injunction was based entirely upon the nationwide collective bargaining agreement between the parties. The IUEC chose to make the arbitration in Cedar Rapids the testing ground for its claim that the Standard Agreement did not permit wage reductions. The IUEC chose to ask a federal District Court in New York to enjoin any wage reductions on a nationwide basis pending that arbitration and, after receiving an unfavorable award, returned to that same court seeking (1) to vacate the award rendered in that arbitration; *and* (2) to permanently enjoin such wage reductions anywhere in the United States.

In his judgment, Judge Goettel dismissed the IUEC's complaint seeking a nationwide injunction against wage reductions (81a). He did so *because* he confirmed the Goldberg award which expressly held that such reductions were authorized by the Standard Agreement (*id.*). NEII submits that neither Judge DeAnda nor the Fifth Circuit accorded Judge Goettel's judgment the preclusive effect to which it was entitled.

Several Courts of Appeals have recently addressed the issue of the binding effect of a judicially confirmed award on subsequent attempts to rearbitrate the same dispute and all have reached the same conclusion.

These cases all concerned the issue of the appropriate crew size under the Containerization Agreement of the International Longshoremen's Association ("ILA") Master Contract. The dispute first arose in Galveston, Texas, and, pursuant to the Master

Contract, was submitted to arbitration before the Emergency Hearing Panel ("EHP") in New York. The EHP issued an award upholding the ILA's grievance. Under the relevant provision of the ILA Master Contract that award is final and binding on the parties.

The ILA commenced litigation in the District Court for the Southern District of New York to confirm the award. The District Court joined as defendants the various regional employer associations who were parties to the Master Contract and confirmed the award as against all the parties.[10] *ILA v. West Gulf Maritime Ass'n*, 605 F. Supp. 723 (S.D.N.Y. 1985). The Second Circuit affirmed the actions of the District Court. 765 F.2d 135 (2d Cir. 1985).

The various employer associations then sought to obtain rearbitration of the same issue which had been resolved in the prior arbitration and the attendant litigation concerning the award. The various Courts of Appeals all held that such rearbitration was precluded by the judicial confirmation of the arbitration award. *S.E.L. Maduro (Fla.) Inc. v. ILA*, 765 F.2d 1057 (11th Cir. 1985); *S.C. Stevedores Ass'n v. Local 1422, ILA*, 765 F.2d 422 (4th Cir. 1985). *See also, Savannah Maritime Ass'n. v. ILA*, 121 LRRM 2725 (S.D. Ga. 1985) (not officially reported). *Cf. Hampton Roads Shipping Ass'n v. ILA*, 746 F.2d 1015, 1017 (4th Cir. 1984) (injunction against strike affirmed pending final order in the New York litigation; however, order directing arbitration vacated), *cert. denied*, 471 U.S. 1102 (1985); *West Gulf Maritime Ass'n v. ILA*, 751 F.2d 721 (5th Cir. 1985) (injunction and direction to arbitrate vacated and complaint dismissed on

---

10. In the instant case, there was no need to join the various IUEC locals in the New York litigation because NEII and the IUEC are the only parties to the Standard Agreement and the arbitrations thereunder. *See National Elevator Industry, Inc. v. Local No. 5, IUEC*, 426 F. Supp. 343, 349-350 (E.D. Pa. 1977).

grounds of comity; New York court in position to render final decision), *cert. denied,* 106 S. Ct. 133 (1985).

The same factors present in these cases are present in the instant case, to wit: (1) a nationwide, multi-employer collective bargaining agreement; (2) a judicially confirmed arbitration award construing that contract so as to recognize that the nationwide agreement should be applied in the same manner in different cities.

Judge DeAnda sought to distinguish the *S.E.L. Maduro* and *S.C. Stevedores* cases "because the awards in issue in both cases were binding on all parties under the terms of the contract involved" (7a). The court below clearly erred in this regard. The Standard Agreement, like the contracts in the *S.E.L. Maduro* and *S.C. Stevedores* cases, makes arbitration awards "final and binding on all parties" (39a).

The Fifth Circuit's failure to follow the rule set forth by the Fourth and Eleventh Circuits in *S.E.L. Maduro* and *S.C. Stevedores* (or to explain its seeming departure from its prior holding in *West Gulf Maritime, supra*), creates a split in authority among the Circuits as to the preclusive effect of a judicially confirmed arbitration award under a nationwide collective bargaining agreement.

More importantly, it places the Fifth Circuit in direct conflict with the Second Circuit as to the specific preclusive effect of the Goldberg award. Judge Goettel expressly relied upon his judicial confirmation of the Goldberg award as the sole basis for his dismissal of the IUEC's plenary action seeking a nationwide injunction (81a). Thus, Judge Goettel held that the scope and meaning of the Goldberg award barred a federal court from enjoining wage reductions anywhere in the United States. The Second Circuit affirmed Judge Goettel's judgment and this Court denied certiorari. Yet, Judge DeAnda and the Fifth Circuit declined

to give preclusive effect to those rulings, holding to the contrary that the scope of the Goldberg award was limited to Cedar Rapids on the basis of Judge DeAnda's "literal/mechanical" standard.

Indeed, the District Court below arrogated to itself the responsibility of, in effect, overruling a portion of Judge Goettel's judgment. Judge DeAnda held that Judge Goettel lacked jurisdiction to do anything other than confirm the Goldberg award (9a).[11]

Judge DeAnda's comments as to Judge Goettel's jurisdiction were *sua sponte*. The IUEC, itself, asked Judge Goettel to vacate the Goldberg award *and* to then grant summary judgment on the IUEC's request for a permanent, nationwide injunction against any wage reductions by NEII (25a-26a). There is simply no basis for Judge DeAnda's comment that Judge Goettel lacked jurisdiction to decide the issue of a nationwide injunction, an issue placed before Judge Goettel by the IUEC pursuant to 29 U.S.C. § 185(a).

It is true that a District Court sitting in one Circuit need not follow judicial precedents from another Circuit. Here,

---

11. Judge DeAnda also erred in stating that the court's denial of a *preliminary* injunction was not entitled to *res judicata* treatment (9a). NEII has never argued that Judge Lowe's denial of the IUEC's reguest for temporary relief was binding on the federal District Court in Texas. Rather, NEII submits that Judge Goettel's dismissal of the IUEC's complaint seeking a *permanent* injunction against wage reductions anywhere in the United States was entitled to preclusive effect before the Texas court.

however, the same issue already resolved by one District Court was presented by the same parties to a second District Court. In such an instance, the second court *must* apply the related do .rines of claim preclusion and issue preclusion so as to bar relitigation. *Federated Department Stores v. Moitie,* 452 U.S. 394 (1981); *Kremer v. Chemical Construction Corp., supra* at 467 n. 6; *Migra v. Warren City School District Bd. of Ed.,* 465 U.S. 75, 77 n. 1 (1984).

NEII submits that the circumstances warranting application of both claim preclusion and issue preclusion are present in the instant action. *Kremer v. Chemical Construction Corp., supra* at 467 n. 6.

Arbitrator Goldberg held that NEII was authorized to reduce wages under the Standard Agreement. Because Judge Goettel confirmed that finding, he dismissed the IUEC's action to enjoin such wage reductions anywhere in the United States. Judge Goettel's judgment was rendered final and binding by the Second Circuit's affirmance and this Court's refusal to grant certiorari. The IUEC's attempts to prohibit NEII from making such wage reductions in Houston and Dallas are thus barred by claim preclusion. *Kremer v. Chemical Construction Corp., supra; Federated Department Stores v. Moitie, supra.*

Even assuming *arguendo*, that the IUEC's entire claim is not barred by claim preclusion, at least two findings of fact and law necessarily made by Judge Goettel in confirming the Goldberg award are binding in the Texas litigation by operation of issue preclusion. Judge Goettel's findings that Arbitrator "Goldberg quite properly looked to the history of the [Standard Agreement] and found that the use of the word 'increase' was not in any way intended to bar decrease" as well as his ultimate holding that the Goldberg award "draws its essence" from the Standard Agreement (590 F. Supp. at 1220) were binding upon the parties

and Judge DeAnda and the Fifth Circuit by operation of issue preclusion. As a result, no subsequent court or arbitrator may conclude (1) that the Goldberg award was flawed because Arbitrator Goldberg looked to the history of the Standard Agreement; or (2) that the Goldberg award did not draw its essence from the Standard Agreement. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

Having been afforded the opportunity to litigate the issues (1) whether the Goldberg award should be vacated; and (2) whether NEII should be enjoined from implementing wage reductions on a nationwide basis, and having obtained an adverse judgment which is now final, the IUEC may not collaterally attack that final judgment. *Kremer v. Chemical Construction Co., supra; Federated Department Stores v. Moitie, supra.* Because the Fifth Circuit's summary affirmance of Judge DeAnda's order permits the IUEC to mount just such a collateral attack, this Court should grant certiorari and reverse.

CONCLUSION

NEII respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit so as to address the important issue of the preclusive effect of a judicially confirmed arbitration award on a subsequent attempt to submit the same dispute to arbitration and thereby resolve the conflict among the Circuits on that issue.

Dated: New York, New York
February 10, 1987

Respectfully submitted,

CHARLES O. STRAHLEY
Counsel of Record
MICHAEL T. McGRATH
PUTNEY, TWOMBLY, HALL
& HIRSON
Attorneys for Petitioner

APPENDIX A—DECISION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2323

NATIONAL ELEVATOR INDUSTRY, INC.,

Plaintiff-Appellant,

versus

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
(Docket No. CA-H-85-5315)

(November 13, 1986)

Before THORNBERRY, DAVIS and HILL, Circuit Judges.

PER CURIAM:*

For the reasons assigned in the district court's order of April

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appendix A

17, 1986, the district court's grant of summary judgment in favor of International Union of Elevator Constructors and denial of summary judgment in favor of National Elevator Industry, Inc. is AFFIRMED.

APPENDIX B—DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED APRIL 17, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-5315

NATIONAL ELEVATOR INDUSTRY, INC.

VS.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS

MEMORANDUM AND ORDER

Pending before the Court are Plaintiff's motions for a preliminary injunction and summary judgment, Defendant's motion for summary judgment, and Intervenors' motion for reconsideration. There is no dispute between Plaintiff and Defendant as to the facts of this case. Having reviewed the record and the law, the Court is of the opinion that Defendant's motion for summary judgment should be granted in part and deferred in part, and the remaining motions denied, for the reasons set forth below. The following discussion is designated as the findings of fact and conclusions of law in support of this decision.

Plaintiff is an association of employers in the elevator and escalator construction industry with authority to deal with labor matters on behalf of its individual members. Defendant is the international union vested with the authority to deal with Plaintiff on behalf of its union locals. Intervenors are union locals located

in Houston, Texas and Dallas, Texas.

Plaintiff seeks to enjoin arbitration of a contract dispute between itself and Defendant, asserting that arbitration is barred by a prior arbitration and a prior judicial decision confirming the results of that arbitration. The contract dispute centers on the issue of whether the local wage rate formula in Article V of the collective bargaining agreement (hereinafter the "standard agreement") between Plaintiff and Defendant allows for decreases in local wage rates as well as increases. It is undisputed that all prerequisite requirements for arbitration have been complied with.

This issue first arose when a wage reduction went into effect in Cedar Rapids, Iowa in August, 1983 based on the formula contained in Article V of the standard agreement. Defendant argued that the wage formula contained in the standard agreement did not contemplate reductions in wages, only increases. Defendant filed a grievance and unsuccessfully sought a "reverse *Boys' Markets* injunction"[1] in the United States District Court for the Southern District of New York to block the wage cut pending arbitration of the grievance. Plaintiff's grievance proceeded to arbitration. In the arbitration proceedings, both parties argued the issue of the interpretation of Article V of the standard agreement as it would apply nationwide, not just in Cedar Rapids.

The arbitration hearing was held by Arbitrator Sinclair Kossoff, but before the parties' post-hearing briefs were filed,

---

1. Referring to *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970), wherein the Supreme Court held that federal courts could enjoin a union from striking when the union and employer have a contractual obligation to arbitrate their dispute. The relief sought here actually presents the reverse situation as it was the union which tried to enjoin adverse action by the employer pending arbitration of the dispute under the contract.

Arbitrator Kossoff recused himself.[2] By agreement of the parties, Arbitrator Stephen Goldberg substituted in for Kossoff to decide the case on the record. On April 23, 1984 Arbitrator Goldberg issued his decision denying Defendant's grievance. On August 29, 1984 the United States District Court issued an order confirming the award, *International Union of Elevator Constructors v. National Elevator Industry, Inc.*, 590 F.Supp. 1218 (S.D.N.Y. 1984), which was subsequently affirmed by the United States Court of Appeals for the Second Circuit, slip op. no. 84-7830 (2d Cir. Feb. 19, 1985), the Supreme Court denied certiorari. 106 S.Ct. 67 (1985).

Plaintiff has now implemented wage reductions in Houston and Dallas based on Article V of the standard agreement. Defendant seeks to arbitrate the wage reduction issue again in relation to these wage cuts. Plaintiff seeks to enjoin further arbitration of this issue.

The initial question confronting the Court is whether the Cedar Rapids arbitration award bars further arbitration of the interpretation of Article V of the standard agreement on the issue of wage reductions in Houston and Dallas. It is well established that an arbitrator's decision can only be enforced as written. *Oil, Chemical & Atomic Workers International Union, Local 4-367 v. Rohm & Haas, Texas, Inc.*, 677 F.2d 492, 494 (5th Cir. 1982); *New Orleans Steamship Association v. General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980), *aff'd sub nom, Jacksonville Bulk Terminals, Inc. v. International Longshoreman's Association*, 457 U.S. 702 (1982). Generally, arbitration awards are not to be given a *res judicata* or *stare decisis* effect by the

---

2. The basis for Arbitrator Kossoff's recusal was that several years earlier he had been associated with a law firm that had represented the Defendant Union.

courts with regard to future disputes that may arise between the parties. Whether an award has a binding precedential effect on a future dispute is a subject for arbitration. *New Orleans Steamship Association,* 626 F.2d at 468. Furthermore, the Court may not under the guise of enforcement broaden the scope of the award by deciding the issue of the precedential effect of the award. *Oil, Chemical & Atomic Workers International Union, Local 4-367,* 677 F.2d at 494. Thus, the Court is required to interpret the arbitrator's decision literally and enforce it mechanically.

The Court's inquiry must begin with the terms of the arbitrator's award. Arbitrator Goldberg framed the issue he decided thusly:

> The central issue presented by this case is whether the Employers were authorized by Article V of the 1967 Agreement, as carried forward into the 1982 Agreement, to decrease the Cedar Rapids wage rate on the basis of the four highest paid building trades in the Cedar Rapids area.

Arbitrator Goldberg thus limited the scope of his award to the Cedar Rapids wage reduction. Although the parties submitted the broad issue to Arbitrator Goldberg and the rationale supporting his decision is based on an interpretation of Article V as it applies nationwide, for whatever reason, he confined the scope of his decision to the Cedar Rapids dispute. As written, the scope of Arbitrator Goldberg's award does not extend to the instant dispute.

Plaintiff argues that Arbitrator Goldberg's decision should be applied nationally because the parties submitted the issue in national terms. Plaintiff further argues that because Defendant's grievance was phrased in national terms, denial of the grievance

makes the award applicable nationally, regardless of the literal wording of Arbitrator Goldberg's decision. The Court, however, is of the opinion that the arbitrator's award must be limited to its specific terms and neither the parties nor the Court can expand upon it.

Plaintiff further argues that the Fifth Circuit's decision in *Oil, Chemical and Atomic Workers International Union Local No. 4-16000 v. Ethyl Corporation*, 644 F.2d 1044 (5th Cir. 1981), allows the Court to extend Arbitrator Goldberg's decision to similar situations. In *Ethyl Corporation*, however, the arbitration award on its own terms applied to "like violations." Thus, the question before the Fifth Circuit was the interpretation of this particular phrase in the specific arbitration award at issue, not the applicability of arbitration awards to similar situations in general. Indeed, the Fifth Circuit has expressly rejected the proposition that arbitration awards may be enforced in similar situations absent express language in the award itself. *New Orleans Steamship Association*, 626 F.2d at 468.

Plaintiff also cites *S.E.L. Maduro (Florida), Inc. v. International Longshoremen's Association Local 1416*, 765 F.2d 1057 (11th Cir. 1985), and *South Carolina Stevedores Association v. Local No. 1422, International Longshoremen's Association*, 765 F.2d 422 (4th Cir. 1985), for the proposition that Arbitrator Goldberg's award can be enforced beyond its express terms. These cases, however, are distinguishable because the awards in issue in both cases were binding on all parties under the terms of the contracts involved. *See S. E. L. Maduro*, 765 F.2d at 1059; *South Carolina Stevedores Association*, 765 F.2d at 423.

The Court thus finds that Arbitrator Goldberg's award only applies to the Cedar Rapids wage reduction and does not bar

arbitration of the Houston and Dallas wage reductions. Whether Arbitrator Goldberg's decision has a *res judicata* or *stare decisis* effect on the current dispute is itself an issue for arbitration.

Plaintiff further asserts that arbitration is barred by the *res judicata* effect of the decisions by the district court denying the preliminary injunction, and confirming the arbitrator's award and denying a permanent injunction against the wage reduction. *Res judicata* will bar a subsequent suit on the same grounds of recovery that were raised or should have been raised in a prior suit when the parties are identical in both suits, the prior judgment was rendered by a court of competent jurisdiction, the prior judgment was a final judgment on the merits, and both suits are based on the same cause of action. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984); *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 559 (5th Cir. 1979). All of these requirements must be met in order for *res judicata* to apply. *Nilsen*, 701 F.2d at 559.

The district court's decision confirming the award and denying a permanent injunction against the wage reduction is not *res judicata* in this case because its scope is limited to the scope of the arbitrator's award. A district court only has authority to determine whether an arbitrator's award has some colorable basis in the contract, and, if so, it must enforce the award as written. Confirmation of the award is not an affirmation that the award represents the correct resolution of the dispute. *International Union of Elevator Constructors*, 590 F.Supp. at 1219-20. Indeed, a judicial decision confirming an arbitrator's award will not preclude a subsequent judicial decision confirming a completely contradictory arbitrator's award. *Connecticut Light and Power Co. v. Local 420, International Brotherhood of Electrical Workers, AFL-CIO*, 718 F.2d 14, 18-20 (2d Cir. 1983). Thus, insofar as

Appendix B

Arbitrator Goldberg's award does not extend to the instant case, neither does the district court's decision confirming and enforcing his award.

Second, the district court's denial of the "reverse *Boys' Markets* injunction" also lacks preclusive effect because Plaintiff has not shown that the district court's decision on the preliminary injunction was a decision on the merits of the wage dispute, and thus denial of the injunction cannot be considered a decision on the merits for *res judicata* purposes. *Hunter Douglas, Inc. v. Sheet Metal Workers International Association, Local 159,* 714 F.2d 342, 346 (4th Cir. 1983). *See also Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979). This is especially true because the district court was asked to evaluate the claim for preliminary injunctive relief in light of the additional policy considerations set forth in the *Boys' Markets* case.

Finally, dismissal of the complaint after confirmation of the award is not *res judicata* over all of the allegations contained therein. As previously stated, the district court only had very limited jurisdiction over the complaint as its authority was confined to confirming and enforcing the award and adjudicating claims for preliminary relief. The district court had no jurisdiction to adjudicate any remaining allegations, and thus dismissal of the remainder of the case was not a decision on the merits. The Court thus finds that *res judicata* does not bar arbitration of the Houston and Dallas wage disputes. The Court thus

ORDERS Plaintiff's motion for a preliminary injunction is DENIED in all respects. It is further

ORDERED that Plaintiff's motion for summary judgment is DENIED in all respects.

Appendix B

Defendant has moved for summary judgment on its counterclaim to compel arbitration of the Houston and Dallas wage reductions and for attorneys' fees. For the reasons stated above, the Court finds that Defendant is entitled to arbitrate the Houston and Dallas wage reductions. The Court further finds that Defendant has complied with the prerequisite requirements for arbitration. The Court thus

ORDERS that Defendant's motion be GRANTED as to the arbitration issue. It is further

ORDERED that Plaintiff and Defendant proceed to arbitration on Defendant's grievances.[3] The Court, however, defers ruling on the attorneys' fees issue at this time. It is further

ORDERED that Defendant submit a brief and affidavits in support of its claim for attorneys' fees by May 16, 1986. Plaintiff shall file a reply brief and controverting affidavits, if any, on the afforneys' fees issue by June 13, 1986.

Finally, Intervenors have made a motion for reconsideration of the Court's denial of their motion to intervene. Federal Rule of Civil Procedure 24(a)(2) provides in pertinent part:

> (a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest,

---

3. Although Plaintiff asserts any order compelling arbitration must order arbitration of the preclusive effect of the Goldberg decision first, the Court is of the opinion that management of the arbitration must be left to the arbitrator.

Appendix B

> *unless the applicant's interest is adequately represented by existing parties.* (emphasis added).

At the December 5, 1985 hearing in this case, Intervenors admitted that they could not bring an action to compel arbitration themselves. *See* Transcript of December 5, 1985 hearing at 7-8 (hereinafter "Tr."). *See also National Elevator Industry, Inc. v. Local No. 5, International Union of Elevator Constructors,* 426 F.Supp. 343, 349-50 (E.D. Pa. 1977). Furthermore, the locals have no right to participate as parties in the arbitration. *Id.* Thus the locals are not proper parties in a lawsuit to compel arbitration.

Counsel also informed the Court at the December 5, 1985 hearing that it was common practice for the union locals to be present at arbitration hearings, and to consult with the international union during the hearings. *See* Tr. 9-11. Furthermore, under the standard agreement, the international is the proper party to represent the union members in a lawsuit to compel arbitration and in the arbitration proceeding itself. There is also an identity between the international and the local unions, as the locals are formally affiliated with the international. *See* standard agreement, Article I. *See also* standard agreement pp. 95-96. Moreover, the locals and the international all seek the same result and there is no conflict among them. The Memorandum filed by Intervenors in support of their motion for reconsideration and Defendant's brief in support of its motion for summary judgment show that these parties' interests are virtually identical. The Court would further note that the international has been vigorously protecting the rights of its members throughout the course of this litigation. The Court thus finds that the international adequately represents the local unions. *See* 7A C. A. Wright & A. R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1909 (1972 and 1985 Supp).

Appendix B

Finally, Rule 24(c) provides, "[t]he motion. . .(to intervene) shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Intervenors have not submitted a pleading in compliance with the rule either in their original motion or their motion for reconsideration. The Court finds that there is no reasonable excuse for Intervenor's failure to comply with the rule and thus Intervenor's motion is not properly before the Court.

The Court thus ORDERS that Intervenors' motion for reconsideration is DENIED in all respects. It is further

ORDERED that Plaintiff and Defendant shall submit a joint report on the status of this case by May 16, 1986.

DONE in Houston, Texas, this 17th day of April, 1986.

s/ James DeAnda
James DeAnda
UNITED STATES
DISTRICT JUDGE

APPENDIX C—FINAL JUDGMENT ENTERED MAY 22, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-5315

NATIONAL ELEVATOR INDUSTRY, INC.

VS.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

FINAL JUDGMENT

By Memorandum and Order of April 17, 1986, the Court denied Plaintiff's motion for summary judgment, denied Intervenor's motion to intervene and granted Defendant's motion for summary judgment on all issues in the case except for Defendant's claim for attorneys' fees. Defendant has now withdrawn its claim for attorneys' fees. Thus, there are no issues remaining in the case. Accordingly, the Court renders final judgment for the DEFENDANT, all taxable costs to be assessed against Plaintiff.

This is a Final Judgment.

DONE in Houston, Texas, this 22nd day of May, 1986.

s/ James DeAnda
James DeAnda
UNITED STATES
DISTRICT JUDGE

APPENDIX D—AFFIDAVIT OF E. JAMES WALKER, JR. IN SUPPORT OF NEII'S MOTION FOR PERMANENT STAY OF ARBITRATION DEMANDED BY IUEC SWORN TO SEPTEMBER 10, 1985

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

NATIONAL ELEVATOR INDUSTRY, INC.,

Plaintiff,

-against-

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Defendant.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

E. James Walker, Jr., being duly sworn, deposes and says:

1. I am the Manager of Labor Relations of Plaintiff, National Elevator Industry, Inc. ("NEII"). I am fully familiar with the facts and circumstances in this litigation and submit this affidavit in support of NEII's motion for a permanent stay of the arbitrations demanded by Defendant, International Union of Elevator Constructors ("IUEC") concerning wage decreases implemented in the Houston, Texas area and in the Dallas, Texas

area. In the alternative, NEII requests that this Court enter an Order defining those issues which the parties must arbitrate.

Parties and Collective Bargaining Agreement

2. NEII is a membership corporation duly organized under the laws of the State of New York, having an office for the transaction of business at 600 Third Avenue, New York, New York, 10016. NEII is the duly authorized representative of its various employer-members, which employer-members are engaged in the business of constructing, modernizing, repairing and maintaining elevators, escalators, dumbwaiters, moving walkways and related products for third-party customers such as building owners and building contractors throughout each of the states of the United States. NEII is duly authorized and empowered by its employer-members to negotiate a collective bargaining agreement governing the wages, hours and working conditions of the elevator mechanics and helpers employed by the employer-members which NEII represents. NEII currently represents approximately 40 employer-members. The employer-members represented by NEII are engaged in business in every state of the United States. Several of the individual employers represented by NEII are engaged in commerce, as defined in the *National Labor Relations Act*, as amended, 29 U.S.C. § 152(6).

3. The IUEC is a labor organization, as defined in the *National Labor Relations Act*, as amended, 29 U.S.C. § 152(5), having an office for the transaction of business at 5565 Sterrett Place, Columbia, Maryland, 21044. The IUEC is duly authorized to negotiate a collective bargaining agreement with NEII with respect to the wages, hours and working conditions of the mechanics and helpers employed by the employer-members represented by the NEII throughout the United States.

Appendix D

4. There has been a long series of collective bargaining agreements between NEII and the IUEC, dating back more than 60 years. On or about July 9, 1982, NEII and the IUEC entered into the most recent collective bargaining agreement governing the wages, hours and working conditions of the employees set forth above. Said agreement governs the wages, hours and working conditions of said employees in every state of the United States. Said agreement is hereinafter referred to as the "Standard Agreement." A true and complete copy of the Standard Agreement is annexed hereto as Exhibit "A".

5. The Court should note that the Standard Agreement is an agreement between NEII and the IUEC. All of the employer-members of NEII are bound by the Standard Agreement, as are all of the local unions of the IUEC, except Local 1 in New York City (which has a separate agreement with a wholly owned subsidiary of NEII). There is a single nationwide collective bargaining unit with a single collective bargaining agreement covering the wages, hours and working conditions on a nationwide basis. As shown on pages 1 and 2 of the Standard Agreement, the Preamble, Articles I and II of the Standard Agreement read as follows:

> "This Agreement, made this Eighth day of July, 1982, by and between the NATIONAL ELEVATOR INDUSTRY, INC. (hereinafter referred to as NEII and its members as the "Employer"), and the INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS (hereinafter referred to as the "Union"), for the purpose of establishing harmonious relations and facilitating peaceful adjustment of wage schedules and working conditions.

Appendix D

ARTICLE I

Parties to the Agreement

THE NATIONAL ELEVATOR INDUSTRY, INC., is authorized and empowered to negotiate and execute this agreement for and on behalf of its members, and a list of the names of the members authorizing NEII to execute this agreement is attached hereto and made a part hereof. The INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS makes this agreement for and on behalf of its affiliated local unions and a list of the Local unions for which the International negotiates and executes this agreement is attached hereto and made a part hereof.

ARTICLE II

Recognition Clause

Par. 1. The Employer recognizes the Union as the exclusive bargaining representative for all Elevator Constructor Mechanics and Elevator Constructor Helpers (hereinafter referred to sometimes as "Mechanics" and "Helpers") in the employ of the Employer engaged in the installation, repair, maintenance and servicing of all equipment referred to in Article IV, Par. 2 and Article IV(A)."

Appendix D

Provisions of Collective Bargaining Agreement Concerning Arbitration and Wage Rate Formula

6. Article XV of the Standard Agreement provides for arbitration, before an impartial arbitrator, of "All differences and disputes regarding the application and construction of" the Standard Agreement. Article XV, paragraph 2 provides that "The decision of the impartial arbitrator shall be final and binding on all parties." (Pages 62 to 67 of Standard Agreement).

7. Article V of the Standard Agreement sets forth a formula for computing the wages to be paid by the employer-members of NEII to the elevator mechanics and helpers represented by the IUEC. The formula is known as the "Atlantic City formula" because it was initially negotiated by NEII and the IUEC in Atlantic City, New Jersey, in 1921. As is shown at pages 24 through 32 of the Standard Agreement, the formula is somewhat complex in that it involves eight "steps" and there are several other paragraphs of Article V which set forth the agreement of the parties as to certain aspects of the formula. It is not necessary for purpose of the litigation before the Court for the plaintiff to explain the formula in detail. In broad terms, the formula computes the current wage rate for an elevator mechanic working within the geographic jurisdiction of a given local of the IUEC based upon the current wage rates and increases in fringe benefit costs of certain other building trades in the home town of that local union of the IUEC and also based upon the current increase in costs of fringe benefits for the elevator mechanic. In broad terms, the wage rate for the elevator mechanic is based upon the average wage rate of the four highest trades of the seven trades listed in the formula, (the bricklayers, plasterers, carpenters, electricians, sheet metal workers, plumbers and ironworkers) plus the average increase in the cost of fringe benefits for those four highest trades,

minus the increase in fringe benefit costs for the elevator mechanic. Regardless of the precise details of the formula, for the purpose of the instant action the important fact is that the Standard Agreement sets forth a single wage formula which is to be applied uniformly throughout the United States for each local union of the IUEC.

8. Under the terms of the Standard Agreement, the wage rate for the elevator mechanic may change not more often than once every eleven months for each particular local union. The dates upon which the wage rate changes vary from one local union to another. In practice, this means that there is a different wage rate for each of the 98 local unions of the IUEC throughout the United States and that the wage rate for each local union changes approximately every year. In practice, the calculations under the formula have been routinely made by NEII's staff in New York City, which then sends written notification of the amount and effective date of each new wage rate to the IUEC, the IUEC local union and the individual employers that are engaged in business in the geographic area for which the wage rate is applicable.

9. Currently, the highest wage rate for an elevator mechanic is paid in San Francisco, California, $30.48 per hour. The lowest wage rate for an elevator mechanic is paid in Columbia/Greenville, South Carolina, $11.25 per hour. However, the important fact is that the wage rate for an elevator mechanic in San Francisco was computed under the formula in precisely the same manner that the wage rate for an elevator mechanic in Columbia/Greenville, South Carolina was computed under the formula. The difference in the result of the application of the formula is attributable to the fact that the average wage rate and average increase in cost of fringe benefits for the four highest trades in San Francisco is substantially higher than the same averages in

Appendix D

Columbia/ Greenville, South Carolina.

Trends Affecting Calculation of Wage Rates Under the Wage Formula in Recent Years

10. For many years prior to 1977, the wage rates of the elevator mechanics in cities throughout the United States ordinarily increased from year to year under the formula because the average wage rate of the four highest trades in those cities increased. However, in recent years there has been a substantial increase in the amount of construction work which is performed by non-union tradesmen at wage rates which are generally lower than the wage rates for unionized tradesmen. In order to meet this competition from non-union tradesmen, the unionized trades in the construction industry have in many cities throughout the United States agreed to wage rate freezes or wage rate reductions in recent years. As the bricklayers, ironworkers, carpenters, plasterers, sheet metal workers, electricians and plumbers have agreed to wage rate freezes or reductions in various localities, their average wage rate has obviously decreased. Under the formula, the decreased wage rates of these other trades have resulted in a decrease in the wage rate of the elevator mechanic working in the same locality. Commencing in 1977, the wage rate of the elevator mechanic has been reduced approximately sixty-eight (68) times in various geographic areas of the country. In certain cities, such as Denver, Colorado, the wage rate for the elevator mechanic has been reduced more than once. The wage rate in Denver, Colorado was reduced in 1984 and again in 1985.

The Arbitration of the Dispute With Respect to the Interpretation of the Wage Formula In the Standard Agreement

11. In July, 1983, the wage rate for an elevator mechanic

employed by a NEII employer in Cedar Rapids, Iowa was $15.08 per hour. On August 1, 1983, NEII notified the IUEC that NEII had recalculated the wage rate for a mechanic in Cedar Rapids based upon the then current wage rates for the ironworkers, carpenters, sheet metal workers, bricklayers, electricians, plasterers, and plumbers. NEII notified the IUEC that based upon the then current rates for these other trades, the hourly rate for an elevator mechanic working in the Cedar Rapids area should be $12.54 per hour. The new wage rate would be a reduction of $2.54 per hour from the existing wage rate for an elevator mechanic in Cedar Rapids.

12. Although there had been relatively modest wage reductions in other cities prior to August 1983, Cedar Rapids was the first time that there was a substantial wage rate reduction under the formula for the elevator mechanic based upon the substantial wage rate reductions of the other trades. In response to the notice from NEII, the IUEC took the position that under the formula, no reduction in wages was permissible other than a 31¢ reduction. This 31¢ reduction was the reduction called for in Step 8 of the formula as a "credit" to the NEII employers for the increased costs to the NEII employers of the fringe benefits for elevator mechanics in the Cedar Rapids area. This 31¢ credit is expressly set forth in paragraph 1E on pages 28 and 29 of the Standard Agreement. It was the position of the IUEC that the wage rate of the elevator mechanic should rise if the average wage rate of the other trades rose but that, except to the extent of the aforesaid "credit" in Step 8 of the formula, the wage rate of the elevator mechanic should not fall even if the average wage rate of the other trades fell.

13. In August, 1983, the IUEC demanded arbitration of the dispute whether the wage rate of the elevator mechanic could be

reduced if the average wage rate of the other trades declined. The IUEC also commenced an action against NEII in the United States District Court for the Southern District of New York (Civil File No. 83-6064). In its complaint, the IUEC sought a preliminary and permanent injunction against the proposed wage decrease in Cedar Rapids or "in any other location in the United States." A true copy of the IUEC's complaint is annexed hereto as Exhibit "B".

14. The IUEC moved for a temporary restraining order to enjoin a wage decrease in Cedar Rapids or elsewhere in the United States, pending arbitration of the dispute as to the interpretation of the wage formula. After reviewing written submissions by the parties and hearing argument of counsel, the Hon. Mary Johnson Lowe, denied the IUEC's motion for a temporary restraining order. A true and complete copy of Judge Lowe's Order is annexed hereto as Exhibit "C". The new wage rate for elevator mechanic in Cedar Rapids was made effective on August 31, 1983.

15. Thereafter, the parties proceeded to arbitration before Arbitrator Sinclair Kossoff. After the hearing had been closed, Arbitrator Kossoff advised the American Arbitration Association that, twenty years earlier, he had been employed in a law office which had represented the IUEC local union in Chicago and, because of this, Arbitrator Kossoff offered to resign as arbitrator if either party objected. The NEII consented to having Arbitrator Kossoff issue a decision but the IUEC objected. NEII moved in the District Court for an order compelling Arbitrator Kossoff to issue a decision but the District Court denied NEII's motion. A copy of the decision of Hon. Gerard L. Goettel denying NEII's motion in this respect is annexed hereto as Exhibit "D". Thereafter, Arbitrator Kossoff resigned as arbitrator because of the IUEC's objection to him. The American Arbitration Association then submitted a new panel of proposed arbitrators to NEII and the IUEC and, from the new panel the IUEC and

Appendix D

NEII then mutually selected Arbitrator Stephen B. Goldberg to serve in Arbitrator Kossoff's place.

16. NEII and the IUEC agreed that Arbitrator Goldberg would render his decision based upon the transcript of the hearing before Arbitrator Kossoff, the exhibits received in evidence, and the briefs of the IUEC and NEII. NEII agreed to this procedure principally because of the sudden death of Lee Turner, NEII's chief witness as to the events in 1967, as described below in paragraph 18.

17. As noted above, there has been a wage formula in the Standard Agreement since 1921. The wage formula in the Standard Agreement has been amended from time to time during collective bargaining between the IUEC and NEII. In the arbitration hearing with respect to Cedar Rapids, the IUEC admitted that the wage formula, as initially negotiated in Atlantic City in 1921 was strictly an "averaging" formula by which the wage rate of the elevator mechanic could rise or fall depending upon whether the average wage rate of the other trades rose or fell. The IUEC admitted that the wage formula continued as an "averaging" formula for 46 years, from 1921 to 1967. In 1967, during the collective bargaining which preceded the execution of the Standard Agreement for 1967-1972, NEII and the IUEC agreed to revise the formula to put it in the form of the eight "steps" which are set forth in the current Standard Agreement. At the arbitration hearing with respect to the wage reduction in Cedar Rapids, NEII introduced substantial evidence to show that the only reason for putting the formula into the eight "steps" in 1967 was to devise a method for separately accounting for the costs of fringe benefits in the formula. The IUEC admitted that this was the reason the parties created the eight steps in 1967 but the IUEC argued that the eight steps also had the effect of changing the formula so

that the wage rate of the elevator mechanic would rise if the average wage rate of the other trades rose but that the wage rate of the elevator mechanic would not fall if the average wage rate of the other trades fell. NEII denied that the formula was changed in 1967 so as to create a guaranteed wage rate for the elevator mechanic. Thus, the issue in the Cedar Rapids arbitration turned upon the intent of the parties in revising the formula in the 1967 negotiations.

18. The Chairman of the NEII negotiating committee in 1967 was Lee Turner. During negotiations between NEII and the IUEC it is customary for the Chairman of the NEII committee to meet privately with the highest ranking IUEC official from time to time, sometimes with and sometimes without a federal mediator. The Chairman of the NEII committee also attends all of the formal negotiating sessions between NEII and the IUEC and is the chief spokesman for NEII at these sessions. Mr. Turner was the only witness for NEII in the arbitration with respect to the events in 1967. Mr. Turner testified about the discussions which he had at the 1967 negotiations concerning the wage formula and also testified about a letter written by him in 1967 which the IUEC introduced in evidence. Mr. Turner was the only witness available to NEII with complete knowledge of the 1967 negotiations. Mr. Turner died suddenly in January, 1984, approximately two months after the arbitration hearing before Arbitrator Kossoff. It was because of the death of Mr. Turner that NEII finally agreed to permit Arbitrator Goldberg to decide the case on the basis of the transcript of testimony before Arbitrator Kossoff, the exhibits received in evidence and the post hearing briefs of NEII and the IUEC.

19. On April 23, 1984, Arbitrator Goldberg rendered an opinion and award. A true and complete copy of the Opinion

and Award is annexed hereto as Exhibit "E". Arbitrator Goldberg held that NEII had properly interpreted the wage formula. Arbitrator Goldberg held that the wage rate of the elevator mechanic should be reduced under the formula if the average wage rate of the other trades declined.

The Litigation With Respect to the IUEC'S Attempt to Obtain A Permanent Injunction Against the Reduction of the Wage Rate of the Elevator Mechanic Anywhere in the United States

20. After issuance of Arbitrator Goldberg's Opinion and Award, NEII moved in the pending action in the United States District Court for the Southern District of New York: (a) to confirm the award; and (b) for judgment dismissing the IUEC's complaint for permanent injunction against wage reductions in Cedar Rapids or in any other city of the United States. The IUEC cross-moved (a) to vacate the award and (b) for summary judgment on its complaint for a permanent, nationwide injunction against wage decreases. In a judgment dated September 12, 1984, Judge Goettel denied the IUEC's cross-motions, granted NEII's motion to confirm the award and dismissed the IUEC's complaint for a permanent injunction against a wage reduction in Cedar Rapids or in any other location in the United States. A true copy of the Judgment signed by Judge Goettel is annexed hereto as Exhibit "F". Judge Goettel's opinion is reported at 590 F.Supp. 1218.

It is important to note that Judge Goettel's opinion in the District Court expressly refers to the effect of Arbitrator Goldberg's award not only in Cedar Rapids but in all of the other cities in the country where the wage formula, as construed by Arbitrator Goldberg, might result in a wage decrease for the elevator mechanic.

Appendix D

> "The IUEC is disturbed by the findings of Arbitrator Goldberg, not only because of their impact on the Cedar Rapids workers, *but also because of the implications for its members in other locals across the country.*" (emphasis supplied)

International Union of Elevator Constructors v. National Elevator Industry, Inc., supra at 1219.

21. The IUEC appealed from the judgment entered in the District Court to the United States Court of Appeals for the Second Circuit. In an unpublished opinion, the Second Circuit affirmed the judgment "substantially for the reasons stated in the opinion of Judge Goettel." A true copy of the Second Circuit's unpublished opinion is annexed hereto as Exhibit "G".

22. The IUEC has filed a petition for a Writ of Certiorari with the United States Supreme Court, which petition is still pending as of the date of this affidavit. Copies of the IUEC's petition, and NEII's brief in opposition to the petition are annexed hereto as Exhibits H and I. These two exhibits summarize the issues involved in the arbitration decided by Arbitrator Goldberg. It is important to note that, as shown at pages 7 and 8 of the IUEC's petition, the IUEC has expressed the position to the Supreme Court that Arbitrator Goldberg's Award affects not only the wage rate in Cedar Rapids but the wage rates of the elevator mechanic in the remainder of the United States as well.

Wage Reductions in Other Cities During the Pendancy of the Goldberg Arbitration

23. While the Goldberg arbitration was pending and during the litigation before the United States District Court for the

Appendix D

Southern District of New York, wage reductions occurred on fifty-five (55) occasions throughout the United States, with more than one reduction in certain locations. In implementing these wage reductions, NEII applied the formula to each of these other cities in precisely the same manner as Arbitrator Goldberg had found to be correct and proper. The IUEC did not demand arbitration concerning any of these wage decreases. Instead, when NEII initiated these wage reductions the IUEC wrote letters to NEII clearly indicating that the validity of the wage reductions in these other cities would be determined by the final outcome of the litigation described above. Annexed hereto as Exhibit "J" are copies of letters written by the IUEC to NEII with respect to some of these wage reductions in cities other than Cedar Rapids.

The Reduction in Wage Rates in Houston and Dallas, Texas in 1985

24. In March, 1985, the wage rate for an elevator mechanic in Houston, Texas, was $16.85 per hour. Effective April 4, 1985, NEII changed the wage rate in Houston to $15.195 per hour. NEII made this change by applying the wage rate formula in the Standard Agreement to Houston, Texas, in precisely the same manner that Arbitrator Goldberg had held to be proper and correct in his opinion and award.

25. In May, 1985 the wage rate for an elevator mechanic in Dallas, Texas, was $16.175 per hour. Effective June 16, 1985, NEII changed the wage rate in Dallas, Texas to $14.71 per hour. NEII made this change by applying the wage rate formula in the Standard Agreement to Dallas, Texas, in precisely the same manner that Arbitrator Goldberg had held to be proper and correct in his opinion and award.

Appendix D

The IUEC's Demands for Arbitration with Respect to the Wage Rate Changes in Houston, Texas and Dallas, Texas

26. The grievance procedure set forth in Article XV of the Standard Agreement (page 62 through 67) provides that grievances are to be processed in the steps set forth therein. The last step prior to submission of a grievance to impartial arbitration is discussion of the grievance by the National Arbitration Committee. The National Arbitration Committee is a Committee composed of three NEII representatives and three IUEC representatives. I am not a member of the Committee but I attend Committee meetings because I am NEII's Manager for Labor Relations and I have the responsibility on behalf of NEII for implementing and coordinating decisions made by the Committee.

27. The grievances concerning the wage rate reductions in Houston and Dallas were discussed at a meeting of the National Arbitration Committee on August 27, 1985. I asked the IUEC if the issue which the IUEC sought to arbitrate concerning the wage reductions in Houston and Dallas was the same issue which had been decided by Arbitrator Goldberg. The IUEC took the position that the IUEC wanted to present the same issue which Arbitrator Goldberg had decided to two new arbitrators, one for Houston and one for Dallas.

28. The IUEC took the position at the meeting of the National Arbitration Committee that, with respect to Dallas, there was a second issue which the IUEC wished to arbitrate. The IUEC alleges that NEII did not use the correct rate for the Plasterers' Union in Dallas in making the computations under the wage formula. Specifically, the IUEC alleges that NEII incorrectly failed to take into account a $1.00 per hour contribution to a vacation fund for the Plasterers' Union. This dispute concerning the rate for

Appendix D

Plasterers' Union is separate and independent of the dispute which was decided by Arbitrator Goldberg. If the IUEC is correct in its contention concerning the $1.00 per hour contribution to the vacation fund for the Plasterers' Union, the wage rate for the elevator mechanic in Dallas could be recomputed precisely in the manner which Arbitrator Goldberg found to be proper and correct, using the rate that the IUEC alleges is proper for the Plasterers' Union. If the IUEC is correct in its assertion as to the Plasterers' Union, the wage rate for the elevator mechanic in Dallas would be $14.96 per hour, recomputing the wage rate for the elevator mechanic precisely in the manner which Arbitrator Goldberg found to be correct and proper. Accordingly, there is nothing in the Goldberg Award which would bar arbitration of the dispute concerning the data for the Plasterers' Union. In effect, the IUEC has attempted to combine (a) an issue which may be arbitrated (the Plasterers' rate) with (b) an issue that has already been decided by Arbitrator Goldberg. For this reason, NEII requests the Court to direct the parties to proceed to arbitration with respect to the Dallas grievance and in the Court's order to expressly define the issue to be decided by the arbitrator as the issue involving the Plasterers' dispute and expressly stating that the arbitrator should not decide the issue decided by Arbitrator Goldberg.

29. I also asked the IUEC representatives whether the IUEC wished to present any other issue with respect to either Houston or Dallas. The IUEC took the position that there was no issue to be arbitrated other than the issues set forth above in paragraphs 27 and 28.

30. Annexed hereto as Exhibit K and L are copies of letters dated August 29, 1985, which the IUEC wrote to the American Arbitration Association, in which the IUEC requests the American Arbitration Association to institute the process which will

ultimately result in the appointment of arbitrators to hear the grievances in Houston and Dallas, as described above. Since the American Arbitration Association will proceed with this process unless stayed by Court order, NEII respectfully requests a temporary injunction against the processing of the IUEC's grievances pending the Court's final determination of this action.

s/ E. James Walker, Jr.
E. James Walker, Jr.

Subscribed and sworn to before me, a Notary Public, this 10th day of September, 1985.

s/ Michael T. McGrath
Notary Public
MICHAEL T. McGRATH
Notary Public, State of New York
No. 31-4732079
Qualified in New York County
Commission Expires March 30, 1986

APPENDIX E—EXHIBIT A TO FOREGOING AFFIDAVIT--EXCERPTS FROM STANDARD AGREEMENT BETWEEN NEII AND IUEC

STANDARD AGREEMENT

July 9, 1982 to July 8, 1987

INTERNATIONAL UNION
OF
ELEVATOR CONSTRUCTORS

Preamble

This Agreement, made this Eighth day of July, 1982, by and between the NATIONAL ELEVATOR INDUSTRY, INC. (hereinafter referred to as NEII and its members as the "Employer"), and the INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS (hereinafter referred to as the "Union"), for the purpose of establishing harmonious relations and facilitating peaceful adjustment of wage schedules and working conditions.

Article I

Parties to the Agreement

THE NATIONAL ELEVATOR INDUSTRY, INC. is authorized and empowered to negotiate and execute this agreement for and on behalf of its members, and a list of the names of the members authorizing NEII to execute this agreement is attached hereto and made a part hereof. The INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS makes this agreement for and on behalf of its affiliated local unions and a list of the Local unions for which the International negotiates and executes this

Appendix E

agreement is attached hereto and made a part hereof.

Article II

Recognition Clause

Par. 1. The Employer recognizes the Union as the exclusive bargaining representative for all Elevator Constructor Mechanics and Elevator Constructor Helpers (hereinafter referred to sometimes as "Mechanics" and "Helpers") in the employ of the Employer engaged in the installation, repair, maintenance and servicing of all equipment referred to in Article IV, Par. 2 and Article IV(A).

Par. 2. The Union recognizes that it is the responsibility of the Employer in the interest of the purchaser, the Employer's company and its employees to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product provided, however, that this provision is not intended to affect the work jurisdiction specified in Article IV and other Articles of the agreement.

Wages

Par. 1. The rate of wages to be paid to Elevator Constructor Mechanics and Elevator Constructor Helpers by the Employers shall be based on terms of the International Agreement covering the elevator industry throughout the United States and shall continue during the term of this agreement, as follows:

1A. At meetings held in the Washington, D.C., office of the Federal Mediation and Conciliation Service during March 1967,

Appendix E

the representatives of NEII and the International Union of Elevator Constructors agreed to amend and modify the 1921 Atlantic City Plan for establishing the rate of wages of Elevator Constructor Mechanics and Helpers to provide that, beginning January 1, 1967, the rate of wages of all Elevator Constructor Mechanics and Helpers would be determined in accordance with the following wage plan:

Wage Rate Changes After July 8, 1982

Step 1. Prepare a list of the wage rates of the four (4) trades that were used in determining the last wage rate change of the local union. Then add the wage rates. This total shall be the combined amount of the wage rates of the trades used in determining the last wage rate change of the local union.

Step 2. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increases in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate change. The seven (7) Atlantic City trades are the following principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step 3. Select from the list compiled in Step 2 the four (4) trades with the highest wage rates.

Step 4. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of these same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increases of the four (4) highest trades.

Appendix E

Step 5. Subtract from the total computed in Step 4 the total computed in Step 1. The remaining amount shall be the gross increase.

Step 6. Divide the gross increase as computed in Step 5 by four (4). The remaining amount shall be the average gross increase.

Step 7. Add the average gross increase computed in Step 6 to the existing wage rate of the Elevator Constructor Mechanics.

Step 8. Subtract from the total computed in Step 7 the credits agreed upon in Paragraph 1E, and the result shall be the wage rate for the Elevator Constructor Mechanics.

1B. It is recognized that the development of the substantiating data to support the foregoing Wage Rate Changes shall be the responsibility of the affected Local and the local NEII representative. Initially the affected Local shall develop data and the local NEII representative shall cooperate in the event the Local has difficulty in obtaining copies of any Local Trade Agreement. The affected Local shall submit its written request for a wage rate change to the Executive Director of NEII with a copy to the Area NEII Chairman, the IUEC Regional Director and the IUEC General Secretary-Treasurer. It is further agreed that should a dispute arise over the computation of the Wage Rate Change, the NEII Office and the International Office of the IUEC shall be promptly notified in writing of the dispute.

1C. The wage rate for Elevator Constructor Helpers to be seventy (70) percent of the Elevator Constructor Mechanic's rate. The wage rate and effective date of increase for Probationary Helpers shall be fifty (50) percent of the Elevator Constructor Mechanic's rate for the first six months worked in any nine month

period, as defined in Article X, Par. 3, after which the wage rate is to be seventy (70) percent of the Elevator Constructor Mechanic's rate.

1D. When four (4) or more men, including the Elevator Constructor Mechanic in charge, are employed on new construction or modernization jobs, the Elevator Constructor Mechanic in charge of the job shall have his hourly rate increased 12½% for all hours worked.

1E. (a) the amount of the credits for changes in wage rates after July 8, 1982, under the above wage plan shall be as follows:

Wage Rate Change	Amount
First	22½¢
Second	31¢
Third	29¢
Fourth	29¢
Fifth	29¢

1F. It is agreed that the Seitz, Haughton and Cayton arbitration decisions shall continue to be applied in determining what is a wage rate and what is a fringe payment of one of the Atlantic City Plan trades under the above plan. Where an Atlantic City Trade rewords its agreement so that monies that are now considered part of the wage rate under the Seitz and Cayton decisions should properly be considered a fringe payment under the Haughton decision, these monies shall, for the purpose of the above plan, continue to be carried and considered as part of the trade's wage rate. Similarly, monies that are now considered a fringe payment under the Haughton decision shall continue to be carried as a fringe payment where a trade rewords its agreement

to include such monies as part of the wage rate.

1G. Increases in fringe benefits of the trades under the above plan shall include increases in employers' contributions and/or payments in cash or kind to or for plans, programs or funds for health and welfare, pensions, savings funds, vacation, holidays, supplemental unemployment benefits or any other such kind of fringe. It does not include reimbursement of expenses, changes in hours, change in overtime rates, or increases based upon compounding of benefits resulting from an unchanged percentage of the wage rate. However, a change in percentage of the wage rate for a fringe benefit shall be an increase.

1H. For purposes of computation hereunder, all increases in fringe benefits shall be translated where necessary into cents per hour.

1I. No trade increase in rate or fringe benefit shall be used in more than one wage increase request hereunder. There shall be no duplication of increases.

Par. 2. Agreement upon the wage rate may continue as long as satisfactory to both parties, but no change in wage rate shall be made more often than eleven (11) months. Thirty (30) days' notice in writing shall be given by either party of a desire to make such change and such written notice shall constitute cause for a meeting of both parties. Change in wage rates shall not be effective in less than thirty (30) days after the effective date of the last wage rate change used in determining the Elevator Constructor Mechanic's and Elevator Constructor Helper's wage rates.

Par. 3. In the event that any one of the seven trades

enumerated in Article V, Par. 1A. of this agreement, has no established International Union in that locality, then the wage rate of that trade shall be established by an International Representative of the Union and a National Representative of the Employers.

Par. 4. The wage rates set out in various Paragraphs 1 through 3 of Article V, apply to all Elevator Constructor Mechanics and Elevator Constructor Helpers engaged in construction, repair, modernization and contract service work, as defined and covered in this agreement.

Par. 5. It is understood that the wage rates and increases in fringe benefits used in arriving at the Elevator Constructors rates are to be taken from the building craft rates in the home town of the local. Where a dual local exists the rates and increases in fringe benefits used may be taken from either of two towns, but not both, where a primary jurisdiction now exists. The towns selected shall be used during the life of this agreement.

Par. 6. It is understood and agreed that any increase in wage rate or fringe benefits provided herein are subject to prior approval by the Construction Industry Stabilization Committee so long as it is operative. It is understood and agreed that where a local union fails to make a timely request for a wage rate, the IUEC and NEII, in order to insure contributions to the fringe benefit funds, shall have the right jointly to place into effect a wage rate change.

Article XV — Arbitration

Par.1. All differences and disputes regarding the application and construction of this Agreement shall be resolved under the

Appendix E

following procedure:

Any employee or local union or employer (hereinafter called the "grievant") who believes that he/it has a justifiable grievance shall, within ten work days after the cause of grievance is known or should reasonably have been known, discuss it with the designated Employer representative (or Local Union Business Representative if an Employer grievance). If the grievance is initiated by an employee, the Local Business Representative shall be present during the discussion. The Employer's designated representative shall, within three work days after the discussion, notify the employee and the Local Union Business Representative of his disposition of the matter. The Local Union Business Representative shall similarly respond to an Employer's grievance.

Par. 2.

Step 1. If the dispute remains unresolved, then within thirty (30) calendar days after the grievance occurred, the grievant shall set forth in writing, on provided forms, the facts and Agreement provisions in question (if known). Within five (5) work days of receipt of the written grievance, the Employer (or the Local Union) shall give its answer on this form.

If the dispute still remains unresolved, the grievant may, within ten (10) work days thereafter, transmit the grievance form to the NEII and the IUEC for referral to the Regional Director of the IUEC and the Area Labor Chairman of NEII or its designated representative who shall meet within ten (10) work days of receipt of the grievance form. If the grievance is then resolved it shall be final and binding on the grievant and the Employer (or the Local Union if the Employer is the grievant).

Appendix E

Step 2. If the dispute still remains unresolved it may then be referred within seven (7) days of the above meeting to the National Arbitration Committee to hear the dispute. The National Arbitration Committee must render a decision or report a deadlock during its next scheduled meeting. A decision of the National Arbitration Committee shall be final and binding on all parties. Pending the National Arbitration Committee meeting, the dispute will be reviewed by a representative of the IUEC and a representative of NEII and if these representatives are able to resolve the dispute, then their decision shall be final and binding on all parties.

Step 3. If the matter cannot be resolved in Step 2 it may be referred to an impartial arbitrator by either the IUEC, the non-association member Employer or NEII within seven (7) work days of the National Arbitration Committee meeting by notifying the American Arbitration Association that the matter is to be arbitrated. The arbitration, selection of arbitrator and all other matters shall be governed by the rules of the AAA. Notification shall be made to the regional office of the AAA nearest the place where the grievance arose or referred to that office by the office receiving the request.

The arbitrator shall render his decision immediately upon the close of the record if the parties mutually agree or within 30 days of the receipt of the transcript or briefs if the parties desire to file briefs. The parties are encouraged to expedite the arbitration process. In an arbitration, either party may rely upon Articles in the Standard Agreement other than those set forth in the original grievance form. The decision of the impartial arbitrator shall be final and binding on all parties.

Appendix E

Par. 3.

(a) Any of the time limits contained herein may be mutually extended by the representative of the parties involved in each step. Failure to process the grievance within the above time limits shall be considered an abandonment of the grievance. If an answer to a grievance is not given within the above time limits, the grievance shall be processed to the next step automatically.

(b) The National Arbitration Committee shall consist of three (3) representatives appointed to the Committee by the International Union of Elevator Constructors and three (3) representatives appointed by the National Elevator Industry, Inc. The Committee shall meet quarterly or at such other times as may be mutually agreeable.

(c) It is understood that neither the National Arbitration Committee nor an impartial arbitrator shall have any power to add to, subtract from, or modify in any way any of the provisions of this Agreement.

(d) Grievances of NEII or the IUEC shall originate in Step 2 by submission to the National Arbitration Committee. A grievance of an IUEC Regional Director shall be filed and processed as if the grievance were filed by a local union.

(e) Non-association members shall pay to the NEII all expenses incurred by the Association in the processing of the non-member's grievance or dispute.

This payment by non-association members shall be considered as part of the Grievance and Arbitration determination.

Appendix E

(f) Costs of the AAA and compensation and expenses of the Arbitrator shall be shared equally by the Union and NEII.

(g) It is agreed that NEII and the IUEC, or a non-association member Employer and the IUEC, may agree to waive the convening of the National Arbitration Committee and may submit an unresolved difference or dispute directly to arbitration.

APPENDIX F—EXHIBIT B TO FOREGOING AFFIDAVIT—COMPLAINT IN ACTION COMMENCED IN UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO
Clark Building, Suite 530
5565 Sterrett Place
Columbia, MD 21044,

Plaintiff,

v.

NATIONAL ELEVATOR INDUSTRY, INC.
800 Third Avenue
New York, NY 10016,

Defendant.

COMPLAINT

Plaintiff International Union of Elevator Constructors, AFL-CIO (hereinafter "IUEC") brings this civil action for injunctive relief and damages.

Jurisdiction

1. Jurisdiction of this Court is founded on Section 301 of

the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (hereinafter "LMRA").

Parties

2. Plaintiff IUEC is a labor organization representing employees in an industry affecting commerce as defined in Section 501 of the LMRA, 29 U.S.C. § 142, and within the meaning of Section 301 thereof, 29 U.S.C. § 185. The IUEC and its affiliated locals are the bargaining representative for employees of the employer members of the National Elevator Industry, Inc. (hereinafter "NEII").

3. Defendant NEII is a corporation located at 800 Third Avenue, New York, New York 10016 and is doing business within the Southern District of New York. NEII is a voluntary, incorporated association whose member companies are engaged in the elevator construction maintenance and repair industry and as such are employers in an industry affecting commerce, as defined in Section 501 of the LMRA, 29 U.S.C. § 142 and within the meaning of Section 301 thereof, 29 U.S.C. § 185. NEII is the duly authorized representative of its various employer members and is vested with authority to negotiate and execute collective bargaining agreements for and on behalf of its employer members, with the IUEC governing the wages, hours, and working conditions of elevator constructor mechanics and helpers represented by the IUEC.

4. At all times material to this lawsuit, NEII and the IUEC have been parties to a collective bargaining agreement known as the Standard Agreement, entered into and executed by NEII for and on behalf of its member companies. The most recent Standard Agreement became effective on July 9, 1982, is still in full force

and effect, and is scheduled to expire on July 8, 1987. The immediately preceding Standard Agreement was in full force and effect from July 9, 1977, through July 8, 1982.

5. Article V of the Standard Agreement entitled "Wages," sets forth a detailed formula for determining the wages to be paid to elevator constructor mechanics and helpers in a particular local union area. Under Article V's formula, local union wages may be changed periodically by adding to the existing elevator constructor wage rate the average gross increase in wages and fringe benefits obtained by certain other building trades unions, and then subtracting from that total a credit for increases in fringe benefit contributions that the employers are required to make by other articles of the Standard Agreement as provided in Paragraph 1E of Article V. The formula set forth in Article V for determining wages is as follows:

Second And All Succeeding Wage Rate Changes After January 1, 1967

Step 1. Prepare a list of the wage rates of the four (4) trades that were used in determining the last wage rate change of the local union. Then add the wage rates. This total shall be the combined amount of the wage rates of the trades used in determining the last wage rate change in the local union.

Step 2. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increases in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate

change. The seven (7) Atlantic City trades are the following principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step 3. Select from the list compiled in Step 2 the four (4) trades with the highest wage rates.

Step 4. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of these same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increases of the four (4) highest trades.

Step 5. Subtract from the total computed in Step 4 the total computed in Step 1. The remaining amount shall be the gross increase.

Step 6. Divide the gross increase as computed in Step 5 by four (4). The remaining amount shall be the average gross increase.

Step 7. Add the average gross increase computed in Step 6 to the existing wage rate of the Elevator Constructor Mechanics.

Step 8. Subtract from the total computed in Step 7 the credits agreed upon in Paragraph 1E, and the result shall be the wage rate for the Elevator Constructor Mechanics.

Appendix F

6. The only manner in which a decrease in an existing elevator constructor wage rate can properly occur under Article V is by virtue of the subtractions for the fringe benefit contributions credits, as provided in Step 7 of the wage formula, Article V, Par. 1, Step 7.

7. In a letter to IUEC General President Everett A. Treadway dated August 1, 1983, signed by Frank Aquilino, NEII's Executive Director, NEII announced that it wished to implement a wage change covering the area of IUEC Local 129, Cedar Rapids, Iowa, amounting to a decrease in the hourly wage rate for elevator constructor mechanics of $2.54 per hour.

8. This decrease in the hourly wage rate is improper and in violation of the wage formula provisions of Article V of the Standard Agreement.

9. In a letter dated August 4, 1983, to Mr. Aquilino, General President Treadway stated that the IUEC would not agree to the wage rate change as calculated by NEII.

10. Article XV of the Standard Agreement, entitled "Arbitration," provides a procedure for the resolution of all differences and disputes regarding the application and construction of the Standard Agreement. If a dispute cannot be resolved on a local basis, between the local union and the employer, it is referred to the Regional Director of the IUEC and the Area Labor Chairman of NEII. If the dispute still remains unresolved, it may be referred to the National Arbitration Committee, which is composed of three representatives appointed by NEII and three representatives appointed by the IUEC. If the National Arbitration Committee is unable to reach a decision or if it deadlocks on the issue, then the unresolved dispute may be submitted to an

Appendix F

Impartial Arbitator for a decision which shall be final and binding upon all parties.

11. The wage rate cut for Local 129, Cedar Rapids, is a dispute covered by Article XV of the Standard Agreement. The IUEC is ready, willing and able to arbitrate this dispute.

12. On August 10, 1983, the subject of the wage rate cuts for Local 129, Cedar Rapids, was raised as a grievance by the IUEC at a meeting held in Washington, D.C., of the National Arbitration Committee, the step of the grievance and arbitration process set forth in Article XV just prior to impartial arbitration. At this meeting, representatives of NEII denied the IUEC's grievance over the wage rate cuts in Cedar Rapids and refused to discuss the matter any further. While agreeing to arbitrate the dispute with the IUEC in the future before an impartial arbitrator, NEII indicated it would not hold off implementation of the wage cut pending the outcome of arbitration, over the IUEC's objection. Moreover, NEII indicated it planned to proceed with other similar wage cuts in other areas of the country.

13. The action of NEII and its member companies in unilaterally implementing the wage cuts over the IUEC's objection is in violation of Article V of the Standard Agreement, which does not permit a unilateral change in a wage rate by an employer.

14. The action of NEII and its member companies in unilaterally implementing the wage rate cut for Cedar Rapids pending arbitration will seriously undermine the arbitration process and cause the IUEC and its members irreparable harm. In recent years, NEII and its member companies have demonstrated a history of non-compliance or tardy or partial compliance with arbitration awards. Thus, even if an impartial arbitrator were to

rule in favor of the IUEC in this case and order NEII to restore the wage cuts retroactive to the date when they were first made, such an award might not afford the union full and adequate relief.

15. The union and its members will suffer greater harm if the requested injunctive relief is denied than will be suffered by NEII and its member companies if the relief is granted. Such relief would only require the employers to continue making the wage payments they have already been making and have already included in their bids on existing jobs. On the other hand, if the wage cuts continue, affected IUEC members will be forced to suffer wage reductions of in excess of $2.50 per hour, or $100.00 per week.

WHEREFORE, plaintiff requests that the Court:

1. Issue a preliminary and permanent injunction enjoining defendant NEII and its member companies from implementing a wage decrease for Local 129, Cedar Rapids, Iowa, and in any other location in the United States, pending final resolution of the dispute through arbitration.

2. Award damages for all of the loss plaintiff IUEC and its members have suffered and will suffer as a result of NEII's aforesaid illegal activities in such amount as shall be proven at a hearing thereon.

3. Grant such other relief as the Court may deem proper.

Appendix F

Respectfully submitted,

COHEN, WEISS & SIMON
330 West 42nd Street
New York, NY 10036
(212) 563-4100

By _____
April Harris

O'DONOGHUE & O'DONOGHUE
1912 Sunderland Place, NW
Washington, DC 20036
(202) 785-2237

By _____
Robert Matisoff

APPENDIX G—EXHIBIT C TO FOREGOING AFFIDAVIT—ORDER OF LOWE, J. FILED AUGUST 26, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS AFL-CIO,

Plaintiff,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Defendant.

This cause having come before the Court upon plaintiff's motion for a temporary injunction enjoining defendant from implementing a wage rate reduction for certain elevator employees employed in the area of Cedar Rapids, Iowa and the Court having duly considered the complaint and affidavit submitted by plaintiff in support of its motion and the affidavit submitted by defendant in opposition to the motion, and having heard the arguments of counsel for plaintiff and defendant at a hearing held before this Court on August 23, 1983, it is

ORDERED that the plaintiff's motion for a temporary injunction be, and the same hereby is, DENIED.

s/ Mary Johnson Lowe
U. S. D. J.

APPENDIX H—EXHIBIT E TO FOREGOING AFFIDAVIT--OPINION AND AWARD OF ARBITRATOR STEPHEN B. GOLDBERG DATED APRIL 23, 1984

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between International Union of Elevator Constructors, AFL-CIO

-and-

National Elevator Industry, Inc.

Case Number: 51-30-0619-83R

AWARD OF ARBITRATOR

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The grievance is denied.

s/ S.B. Goldberg 4/23/84
Stephen B. Goldberg

State of)
:
County of)

On this day of , 19 , before me personally came and appeared to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and be acknowledged to me that he executed the same.

Appendix H

AAA Case No. 51-30-0619-83R

In re:

International Union of Elevator Constructors, AFL-CIO

-and-

National Elevator Industry, Inc.

Appearances

Employers:
Charles O. Strahley, Attorney
Michael T. McGrath, Attorney (on the brief)
(Putney, Twombly, Hall & Hirson)

Union:
Robert Matisoff, Attorney
(O'Donoghue & O'Donoghue)

Arbitrator: Stephen B. Goldberg

I. Introduction

In August, 1983, Frank Aquilino, Executive Director of National Elevator Industry, Inc. (hereafter "NEII" or "the Employers") notified Everett Treadway, General President of the International Union of Elevator Constructors (hereafter "IUEC" or "the Union") that NEII desired to make a wage rate decrease of $2.54 per hour for Local 129, Cedar Rapids, Iowa. The basis on which NEII sought to make this decrease was Article V of the 1982-87 Standard Agreement. The Union objected to the

proposed decrease and a meeting was held between the parties on August 10, 1983. When no agreement was reached at that meeting, the Union sought an injunction in the U.S. District Court for the Southern District of New York barring the decrease. The injunction was denied on the ground that if an arbitrator were to find that the decrease was not authorized by the Agreement, he or she could provide full relief to the Union through a back pay award. The Employers in the Cedar Rapids area implemented the proposed wage rate decrease on August 31, 1983, and these proceedings followed.

II. Relevant Contractual Provisions

1962-66 Standard Agreement

ARTICLE V

Wages

Par. 1. The rate of wages to be paid to Elevator Constructor Mechanics and Elevator Constructor Helpers by the Manufacturers shall be based on terms of the International Agreement covering the Elevator Industry throughout the United States and shall continue during the term of this Agreement, as follows:

1A. At a meeting held in Atlantic City, July 11-16, 1921, between the representatives of the Elevator Manufacturers and members of the Executive Board of the International Union of Elevator Constructors, it was agreed that the average wage rate of the five highest of the

following seven principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheetmetal workers, (6) plumbers and steamfitters and (7) ironworkers, be accepted as the wage rate for the Elevator Constructor Mechanics; the wage rate for Elevator Constructor Helpers to be seventy (70) percent of the Elevator Constructor Mechanics' rate.

* * *

1B. It is agreed that only the hourly wage rates of the trades named in the Atlantic City Plan are to be used in determining the wage rates for the Elevator Constructor Mechanics and Elevator Constructor Helpers covered by this Agreement. This means no fringe payments such as welfare plans, tools or clothing allowances, vacations, etc. are to be used.

* * *

Par. 3. Agreement upon the wage rate may continue as long as satisfactory to both parties, but no change in wage rate shall be made more often than eleven (11) months. Thirty (30) days' notice in writing shall be given by either party of a desire to make such change and such written notice shall constitute cause for a meeting of both parties. Change in wage rates shall not be effective in less than thirty (30) days after effective date of last wage rate change used in determining Elevator Constructor Mechanic's and Elevator Constructor

Appendix H

Helper's wage rates.

Par. 4. In the event that any one of the seven trades enumerated in Article V, Paragraph (1A) of this Agreement, has no established International Union in that locality, then the wage rate of that trade shall be established by an International Representative of the Union and a National Representative of the manufacturers.

* * *

Par. 6. It is understood that the wage rates used in arriving at the Elevator Constructors rates are to be taken from the building craft rates in the home town of the Local.

1967-72 Standard Agreement

ARTICLE V

Wages

Par. 1. The rate of wages to be paid to Elevator Constructor Mechanics and Elevator Constructor Helpers by the manufacturers shall be based on terms of the International Agreement covering the elevator industry throughout the United States and shall continue during the term of this agreement, as follows:

1A. At meetings held in the Washington, D.C. office of the Federal Mediation and Conciliation

Appendix H

Service during March 1967, the representatives of N.E.M.I. and the International Union of Elevator Constructors agreed to amend and modify the 1921 Atlantic City Plan for establishing the rate of wages of Elevator Constructor Mechanics and Helpers to provide that, beginning January 1, 1967, the rate of wages of all Elevator Constructor Mechanics and Helpers would be determined in accordance with the following wage plan:

First Wage Rate Change After
January 1, 1967

Step 1. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increases in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate change. The seven Atlantic City Plan trades are the following principal building trades, namely: (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step 2. Select from the above list the four (4) trades with the highest wage rate.

Step 3. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of those same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increases of the four (4) highest trades.

Appendix H

Step 4. Divide by four (4) the total of the combined wage rates and combined fringe increases of the four (4) trades as computed in Step 3.

Step 5. After making the division in Step 4, subtract from the remaining total the credits agreed upon in Par. 1D. After making the subtraction, the remaining amount shall be the wage rate for the Elevator Constructor Mechanics.

Second and All Succeeding Wage Rate Changes After January 1, 1967

Step 1. Prepare a list of the wage rates of the four (4) trades that were used in determining the last wage rate change of the local union. Then add the wage rates. This total shall be the combined amount of the wage rates of the trades used in determining the last wage rate change of the local union.

Step 2. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increase in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate change. The seven (7) Atlantic City trades are the following principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step 3. Select from the list compiled in Step

Appendix H

2 the four (4) trades with the highest wage rates.

Step 4. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of these same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increases of the four (4) highest trades.

Step 5. Subtract from the total computed in Step 4 the total computed in Step 1. The remaining amount shall be the gross increase.

Step 6. Divide the gross increase as computed in Step 5 by four (4). The remaining amount shall be the average gross increase.

Step 7. Subtract from the average gross increase as computed in Step 6 the credits agreed upon in Par. 1D.

Step 8. After making the above subtraction, the remaining amount shall be added to the existing wage rate of the Elevator Constructor Mechanics. The result shall be the wage rate for the Elevator Constructor Mechanics.

* * *

1D. The amount of the credits for changes in wage rates after January 1, 1967, under the above wage plan shall be as follows:

Appendix H

Wage Rate Change	Amount
First	3½¢ plus new vacation credit
Second	5¢ plus new vacation credit
Third	3½¢ plus new vacation credit
Fourth	3¢ plus new vacation credit
Fifth	3¢

The amount of the vacation credit for the first wage rate change shall be one-half percent (½%) of the Elevator Constructor Mechanic's wage rate in effect on January 1, 1967. This same amount shall be the amount of the vacation credit for the second, third and fourth wage rate changes.

1E. It is agreed that the Seitz, Haughton and Cayton arbitration decisions shall continue to be applied in determining what is a wage rate and what is a fringe payment of one of the Atlantic City Plan trades under the above plan. Where an Atlantic City trade rewords its agreement so that monies that are now considered part of the wage rate under the Seitz and Cayton decisions should properly be considered a fringe payment under the Haughton decision, these monies shall, for the purpose of the above plan, continue to be carried

and considered as part of the trade's wage rate. Similarly, monies that are now considered a fringe payment under the Haughton decision shall continue to be carried as a fringe payment where a trade rewords its agreement to include such monies as part of the wage rate.

1F. Increases in fringe benefits of the trades under the above plan shall include increases in employers' contributions and/or payments in case or kind to or for plans, programs or funds for health and welfare, pensions, savings funds, vacation, holidays. supplemental unemployment benefits or any other such kind of fringe. It does not include reimbursement of expenses, changes in hours, change in overtime rates, or increases based upon compounding of benefits resulting from an unchanged percentage of the wage rate. However, a change in percentage of the wage rate for a fringe benefit shall be an increase.

1G. For purposes of computation hereunder, all increase in fringe benefits shall be translated where necessary into cents per hour.

1H. No trade increase in rate or fringe benefit shall be used in more than one wage increase request hereunder. There shall be no duplication or increases.

Par. 2. Agreement upon the wage rate may continue as long as satisfactory to both parties, but no change in wage rate shall be made more

Appendix H

often than eleven (11) months. Thirty (30) days' notice in writing shall be given by either party of a desire to make such change and such written notice shall constitute cause for a meeting of both parties. Change in wage rates shall not be effective in less than thirty (30) days after the effective date of the last wage rate change used in determining the Elevator Constructor Mechanic's and Elevator Constructor Helper's wage rates.

1972-77 Standard Agreement

ARTICLE V

Wages

* * *

Wage Rate Changes
After March 23, 1972

* * *

Step 7. Add the average gross increase computed in Step 6 to the existing wage rate of the Elevator Constructor Mechanics.

Step 8. Subtract from the total computed in Step 7 the credits agreed upon in Paragraph 1E, and the result shall be the wage rate for the Elevator Constructor Mechanics.

Appendix H

III. Summary of Relevant Evidence

For many years prior to 1967, the wage rates of elevator constructors were determined by application of the Atlantic City Plan, adopted by the parties in 1921, and set out in Article V, paragraph 1A of the 1962-1966 Standard Agreement. At the time the Atlantic City Plan was adopted, compensation in the building trades was almost exclusively in the form of wages, with little, if any, provision for fringe benefits. This method of compensation continued almost unchanged until the early 1950's when fringe benefits made their appearance in some construction industry contracts.[1] Along with these benefits came a series of disputes in the elevator constructor industry about the extent to which fringe benefits obtained by other trades should be treated as wages for purposes of calculating the wage rates to which elevator constructors were entitled by virtue of the Atlantic City Plan.

These disputes led to a series of arbitration awards in the mid-1960's. In 1964, arbitrator Peter Seitz held that the cost of vacation and welfare benefits which had been deducted from the negotiated wage rate of a building trades local should be included in that local's wage rate for purposes of the Atlantic City formula. In 1965, arbitrator Ronald Haughton held that the cost of vacation and holiday benefits which were established independently of the wage rate of a building trades local should be excluded from that local's wage rate for purposes of the Atlantic City formula. In 1966, arbitrator Nathan Cayton held that the cost of pension benefits which were deducted from the negotiated wage rate of a building trades local should be included in the wage rate of that local for purposes of the Atlantic City formula.

---

1. The IUEC, for example, negotiated a welfare plan in 1951 and a pension plan in 1962.

These awards served to exacerbate, rather than solve, the problem of whether the fringe benefits of other building trades locals should be treated as wages for purposes of the Atlantic City formula. Approximately 150 local wage rates are determined each year under the Atlantic City formula, and for each one the parties would have to agree on whether each of the fringes negotiated by the other trades in the relevant locality had been deducted from that trade's wage rate, and so was to be included in the elevator constructor's wage rate under the Seitz and Cayton decisions, or had been established independently of the trade's wage rate, and so excluded under the Haughton decision.

Because the Employers wanted to avoid constant disputes as to whether the Seitz and Cayton decisions applied to a particular fringe, or whether the Haughton decision applied, they entered the 1966 negotiations with the goal of altering the Atlantic City formula to contain a clear provision for the treatment of fringes. Basically, NEII proposed to eliminate fringe benefit costs entirely from the Atlantic City formula, and to negotiate contributions for fringe benefits independently of that formula.

The Union, too, entered the 1966 negotiations with the goal of altering the Atlantic City formula, albeit for a slightly different reason. It feared that many of the fringes negotiated by other trades would be found to fall under the Haughton category, with the result that they would be excluded from wages, and the elevator constructors would not get the benefit of them for purposes of increasing their own wage rates. Thus, the Union proposed to calculate wage rates on the basis of the combined wage rates and fringe benefits of the other trades, and to provide fringe benefits for elevator constructors over and above the wage rate established by this formula.

According to Union General President Everett Treadway, who was a member of the Union's bargaining team for the 1966-67

negotiations, the Union also had another purpose in proposing that the original Atlantic City formula be amended. That formula, the Union concedes, could lead to a decrease, as well as an increase, in wages for elevator constructors. While Mr. Treadway testified that, to the best of his knowledge, no such wage decreases had occurred prior to 1966, he further testified that one of the Union's objectives in approaching the 1966 negotiations was to amend the Atlantic City formula to insure that no such decrease could take place.

According to Mr. Treadway, this objective was discussed within the Union negotiating committee, and he believed, when the 1967 Agreement was signed, that it had been achieved. As to whether the Union's objective of altering the Atlantic City formula to prevent wage decreases had been discussed at the bargaining table, Mr. Treadway's position was equivocal. In an affidavit submitted in support of the Union's efforts to obtain an injunction against the Cedar Rapids wage decrease, Mr. Treadway stated:

> I was present at and personally involved in the negotiations that resulted in these changes in the Atlantic City Plan and the 1967-1972 Standard Agreement; and while I cannot say whether any of the employer representatives who participated in the negotiations recognized at that time the significance of this change in language, I can unequivocally state that I and other union representatives recognized it and felt that we had won significant protection for our members against any possible lowering of wages.

Mr. Treadway testified that the foregoing affidavit had been

hurriedly prepared, and that at the time he prepared it he could not say that there had been actual face to face discussions with the Employer negotiators concerning the Union's desire to bar wage decreases. However, Mr. Treadway testified, he had since read minutes and documents that had refreshed his memory.[2] After having read those minutes and documents, Mr. Treadway testified, he could recall that the subject of wage decreases had been discussed by the Union with Employer representatives. Those discussions took place after the FMCS mediator entered the negotiations in March, 1967. Mr. Treadway later testified, however, that while he could recall discussions with the mediator concerning the subject of wage decreases, he could not honestly say who else was present.

The 1966 negotiations, which had begun in October, 1966, and resulted in a strike in February, 1967, concluded on March 23, 1967, and the 1967-72 Standard Agreement was signed, when each party retreated from its initial position regarding the treatment of fringes paid to other trades for purposes of determining elevator constructors wages. In place of either total inclusion or total exclusion, the parties agreed that fringe benefit increases earned by other trades would be included in the Atlantic City formula for the purpose of determining wages, but that the Employers would receive credit, in the wage rate calculation, for the amount of fringes paid by them under the Agreement.[3]

---

2. No such minutes were introduced into evidence by the Union. One document was introduced, a post-negotiation letter of April 11, 1967, from H.L. Turner, chairman of the Employer negotiating committee, to Richard W. Williams, then Union General President. That letter is set out at p. 15, *infra*.

3. The precise terms of the compromise are set out in the excerpt from the 1967 Agreement, pp. 4-8, *supra*.

Appendix H

Subsequent to the signing of the 1967 Agreement, the Union distributed to all its locals copies of the new Agreement, and a "Message from International Headquarters" containing what the Union described as a brief summary of the principal changes in the New Standard Agreement. With respect to wage rates, the Union's message stated:

> Re: Wage Rates (Article V)
>
> Another major objective in negotiations was to correct the inequities of the Atlantic City Plan by obtaining a wage formula that allowed the Elevator Constructor to use the increases in wage rates and increases in fringe benefits of other trades. Not only was this objective obtained but the new agreement also provides that, in determining wage rates, the Elevator Constructor will, in the future, use the four highest instead of the five highest of the seven Atlantic City Plan trades.
>
> The new wage plan, set forth in Article V, may, at first, seem confusing. However, once you get used to it, you will find it is very simple. What it boils down to is this: Hereafter, the local unions will select the four trades with the highest wage rates. They will then average the total increases in wages and fringes that these four trades have received since the local union's last wage rate change. There will be subtracted from this amount the credits set forth in Par. 1D of Article V. The result will be the amount of the increase added to the Elevator Constructor Mechanic's existing

wage rate. The helper will continue to receive 70% of the Mechanic's rate.

The using of four trades rather than five will, with few exceptions, give the Elevator Constructor greater increases than in the past. Further, there is good reason to believe that the average fringe increase of the other trades will, over the years, exceed the amount of credits set forth in Par. 1D. In the judgment of your Negotiating Committee, this new wage formula corrects the inequities of the Atlantic City Plan and will provide the Elevator Constructor with greater wage increases.

Also subsequent to the 1966-67 negotiations, H.L. Turner, who had been the Employers' chief negotiator, sent the following letter to Union General President Williams:

Dear Mr. Williams:

It is agreed that during the term of the 1967-71 Standard Agreement the base wage rate of the Elevator Constructor Mechanics in effect prior to any wage rate change request by any local union will not be reduced as a result of the wage computation under the formula set forth in Article V. It is understood that such wage rate changes will be made no sooner than 11 months after the effective date of the last wage rate change and that the new increases in fringe benefits provided for Elevator Constructors by this Standard Agreement will be made effective at the time of the wage rate change for each local union.

Appendix H

> In the event that the amount of the increase in fringe benefits available to the Elevator Constructors in any year is greater than the amount of the average increase in wage rate and fringe benefits of the four trades with the highest hourly wage rates, the wage rate of the Elevator Constructor will be renewed and the fringe benefits available under the Standard Agreement for that year will be made effective. That effective date will be considered as an effective date of increase, and increases in trade rates and fringe benefits will be measured from 30 days previous to that date for future wage computations.

According to Mr. Turner, the purpose of this letter was to assure the Union that if, during the term of the 1967 Agreement, the wage and fringe increases of the other trades were less than the fringe increases payable under the Agreement, the Employers would not decrease the base wage rate. Mr. Turner testified that neither the Employers nor the Union anticipated that the fringe increases of the other trades would be less than the fringe increases of the elevator constructors, and that the purpose of this letter was to guard against the unexpected.[4]

Mr. Turner also testified that at the time of the negotiations for the 1967 Agreement, the building trades had consistently been receiving large wage increases, and there was nobody in the construction industry, labor or management, who gave any thought to the possibility of wage decreases. Thus, he stated, during the entire 1966-67 negotiations there was never any

---

4. Mr. Treadway testified that in the period preceeding the 1966-67 negotiations the fringe increases of the other trades had been exceeding those of the elevator constructors.

discussion of the effect of a wage decrease in the other trades on the wages of elevator constructors.[5]

Article V of the 1972-77 Standard Agreement differs from Article V of the 1967-72 Agreement only in the respect that Steps 7 and 8 are reversed. According to Mr. Treadway, this change was sought by the Employers because they thought that the fringe increases demanded by the Union were exorbitant. They wanted to be certain that if the elevator constructors increases exceeded the average increase in wages and fringes of the other trades, the Employers would get full credit in determining wages under the Atlantic City formula for the increases received by the elevator constructors, even if that meant a wage decrease for elevator constructors. The Union agreed that wages could be decreased to the extent that the fringe increase credit of Paragraph 1E exceeded the average wage and fringe increases of the other trades.[6]

There have been no relevant changes in Article V of the Standard Agreement subsequent to 1972 (other than an increase in the amount of the fringe benefit credits set out in Paragraph 1E). Thus, for all practical purposes, the controlling contractual provisions, for purposes of this dispute, are those contained in the 1967 Agreement.

---

5. In support of Mr. Turner's testimony that the possibility of wage decreases in the building trades was not contemplated by either party to the 1966-67 negotiations, the Employers introduced evidence that from 1966 through 1982 the wages of the Cedar Rapids building trades increased every year. The first year of wage decrease was 1983.

6. It is on the basis of this provision of the 1972 Agreement, carried forth through the 1982 Agreement, that the Union does not challenge 31 cents of the 1983 Cedar Rapids decrease.

Appendix H

IV. Discussion

The central issue presented by this case is whether the Employers were authorized by Article V of the 1967 Agreement, as carried forward into the 1982 Agreement, to decrease the Cedar Rapids wage rate on the basis of decreases in the wage rates of the four highest paid building trades in the Cedar Rapids area.

The Union makes two basic arguments in support of its position that the wage rate decrease was not authorized. First, the Union argues, the language of Article V authorizes only increases in wage rates based on wages paid to other building trade locals. There is no reference to wage decreases based on the wages paid to other building trades locals, and the Employers have no power to make such decreases. Because the language of Article V is clear and unambiguous, that language must control, and there is no need or justification for resorting to bargaining history to determine its meaning. Second, if bargaining history is examined, that history supports the Union's position.

The Union's initial argument, though not without strength, is not sufficiently powerful to warrant a resolution of this case without a full examination of bargaining history. To be sure, Article V on its face refers only to wage increases. On the other hand, it does not explicitly bar wage decreases. Additionally, it is undisputed that for forty-five years subsequent to the adoption of the Atlantic City Plan, the Employers did have the authority to decrease wages based upon decreases in the wages paid to other trades. If the parties intended to deprive the Employers of that authority in the 1967 Agreement, the intent to make such a significant change should be plain in the bargaining history. This fact, too, warrants an examination of that history.

Turning to the history of the 1966-67 negotiations, the Union contends that one of its primary objectives in those negotiations

was to amend the Atlantic City Plan so as to bar wage decreases based upon decreased wages in other trades. The Union further contends that that objective was discussed at the bargaining table and accepted by the Employer negotiators. In support of this contention, the Union relies on the testimony of General President Everett Treadway, who participated in the 1966-67 negotiations as a member of the Union's negotiating committee. Both Mr. Treadway's testimony and the Union's contentions are, however, undercut by a number of factors.

Initially, Mr. Treadway conceded that at the time of the 1966-67 negotiations he had no knowledge that any wage decreases had taken place pursuant to the Atlantic City Plan. Nor did the Union introduce other evidence that such decreases had occurred and were known to the Union negotiators. To the contrary, H.L. Turner, the Employers' chief negotiator, testified that as of 1966-67, there had been a consistent pattern of increases in building trade wages, and that neither party contemplated the possibility that such wages might decrease in the foreseeable future.[7]

In view of the evidence that building trade wages were not known to the Union negotiators to have decreased prior to 1966, and that there was no basis for assuming that such decreases were likely in the foreseeable future, it is unlikely that the Union would have entered the 1966 negotiations with the goal of amending the Atlantic City Plan so as to prevent such unforeseen decreases from decreasing the wages of elevator constructors.

---

7. The unlikelihood of wage decreases as of 1966-67 was supported, at least in part, by evidence that in the Cedar Rapids area building trade wages increased every year from 1967 through and including 1982. The Union does not argue that Cedar Rapids was unrepresentative in this respect.

Appendix H

If, however, that had been a Union objective, fought for and won at the bargaining table, one would expect the Union to proclaim its victory in its post-negotiation message to its members. In fact, however, that message, in citing the improvements that had been obtained in Article V, referred only to the Union's success in obtaining a wage formula that included the increases in fringe benefits of other trades, and that used the four highest, rather than the five highest, of the Atlantic City Plan trades. The message was absolutely silent with respect to the attainment of the alleged objective of amending the Atlantic City Plan so as to bar wage decreases due to decreases in the wages of other trades. This, too, suggests that the Union neither had, nor thought it had, attained any such objective.

The Union's position is also undercut by inconsistencies in Mr. Treadway's testimony. Initially, Mr. Treadway's affidavit, submitted in support of the Union's request for an injunction, made no reference to any discussion with Employer representatives of the Union's desire to bar wage decreases. At the arbitration hearing, however, Mr. Treadway testified that since preparing that affidavit he had consulted minutes and documents that had refreshed his recollection, and that he did presently recall such discussions with Employer representatives. No such minutes were entered into evidence, however, and the sole document that was introduced, Mr. Turner's letter of April 11, 1967, made no reference whatsoever to any discussions. Finally, Mr. Treadway conceded on cross-examination that while he could recall discussions with the mediator concerning wage decreases he could not honestly say who else was present at those discussions.[8]

---

8. Contrary to Mr. Treadway, Mr. Turner testified that there was no discussion of wage decreases based on decreases in the wages of other trades. The Union attempts to portray that testimony as inconsistent with other portions

(Cont'd)

Appendix H

Not only was Mr. Treadway's testimony with respect to the alleged discussions with Employer representatives on the subject of wage decreases inconsistent, it was inherently implausible. Thus, Mr. Treadway testified that this subject was not discussed with Employer representataives at any time from October, 1966, when negotiations began, through February, 1967, when the Union went out on strike. Rather, he testified, the first discussion of this subject took place after the FMCS mediator entered the negotiations in March, 1967. It is wholly implausible, however, that a subject of such importance, if it was one of the Union's objectives, would not have been discussed with the Employers long before mediation began, some four or five months after the commencement of negotiations. In sum, Mr. Treadway's testimony is so inconsistent and implausible as to weaken, rather than strengthen, the Union's position that it sought, discussed, and obtained a change in the Atlantic City Plan that would bar wage decreases for elevator constructors resulting from wage decreases of other trades.

The Union next seeks to support its position by reference to Mr. Turner's April 11, 1967 letter to Mr. Williams. In particular, the Union relies on the first sentence of that letter, which states:

> It is agreed that during the term of the 1967-71 Standard Agreement the base wage rate of the Elevator Constructor Mechanics in effect prior to any wage rate change request by any local union

---

(Cont'd)
of Mr. Turner's testimony regarding the foreseeability of a situation such as the Cedar Rapids wage decrease, but that attempt is unconvincing. The line of questioning to which the Union refers is quite ambiguous, and provides no basis on which to impeach Mr. Turner's testimony that there had been no discussion in the 1966-7 negotiations of the possibility of wage decreases based upon wage decreases of other trades.

> will not be reduced as a result of the wage computation under the formula set forth in Article V.

This sentence, the Union argues, plainly and unequivocally supports its position that the parties had agreed that the 1967 amendments to the Atlantic City formula barred any wage decreases.

The Employers' response to this argument is that the first sentence cannot be read in isolation. Rather, the letter must be read in its entirety. When that is done, the Employers contend, it is apparent that the only bar to wage decreases that they agreed to was that there would be no such decreases in the event that the average increase in wages and fringes of the other trades was less than the increase in fringes due the elevator constructors under Article V, Paragraph 1E.

The Union, in turn, argues that as of the 1967 Agreement, Steps 7 and 8 of the wage rate formula had not yet been reversed, as they ultimately were in 1972, to permit the subtraction of Paragraph 1E credits directly from the wage rate, rather than from the average gross increase. Hence, Mr. Turner could not have been writing to agree that Paragraph 1E credits would not be subtracted in such a fashion as to result in a wage decrease. Instead, he must have been writing to confirm the parties' agreement that the amended Atlantic City formula could not, under any circumstances, be used to result in a wage decrease.

The Union's arguments are not persuasive. The fringe benefit credit was a new concept, introduced into the 1967 Agreement for the first time, and Article V was not clear as to what would happen if the amount of the credit to which the Employers were

entitled exceeded the amount of the average increase in wages and fringes of the other trades. Step 8 provided that after a credit was subtracted from the average gross increase, the remaining amount should be added to the existing wage rate of the elevator constructors. It did not, however, provide for the contingency that the amount remaining after the subtraction would be a negative number. Under those circumstances, if the Employers did not plan to decrease wages in this contingency, it is entirely plausible that they would so state, without ever considering or addressing their rights in the event that the Article V formula led to a decrease in wage rates resulting from the alternate contingency of a decrease in wage rates of the other trades.

The Union contends that it is wholly implausible that the Employers would have spent weeks negotiating a detailed wage formula, and then immediately have turned around and agreed not to use the result generated by that formula. Mr. Turner testified, however, that neither the Employers nor the Union anticipated that the theoretically possible result of NEII fringe increases being greater than the wage and fringe increases of the other trades was likely. Indeed, the Union's post-strike message to its members makes precisely this point. Hence, the Employers could reassure the Union, at little risk to them, that the new credit would not result in wage decreases. Such an assurance is not, contrary to the Union's contention, at all implausible.

The Union's next argument is that the reversal of Steps 7 and 8 in the 1972 Agreement, for the admitted purpose of authorizing wage decreases based on NEII fringe increases exceeding the wage and fringe increases of other trades, undercuts the Employers' claim that the 1967 formula authorized such decreases, as well as the Employers' argument that the purpose of Mr. Turner's letter was solely to assure the Union that such

decreases would not occur. For, the Union argues, if the 1967 formula authorized decreases under those circumstances there would have been no need to reverse Steps 7 and 8 in 1972 to authorize such decreases.

This argument, too, is unpersuasive. The Employers had agreed, by virtue of Mr. Turner's 1967 letter, that they would limit the amount of the Paragraph 1E credit to any increase in wages due under the Article V formula, and would not take advantage of any decrease in wages to which they might be entitled by virtue of that credit. In 1972, with Union fringe demands increasing, the Employers wanted to be able to take full advantage of whatever credit against wages they were entitled to by virtue of Paragraph 1E, including the possibility of a wage decrease resulting from that credit. They needed Union agreement to do so in light of their explicit 1967 agreement contained in Mr. Turner's letter not to do so. Hence, the Employers' 1972 action in seeking explicit authority to decrease wages based on increased fringes demonstrates neither that the 1967 Standard Agreement did not authorize such decreases, that Mr. Turner's letter was not designed to waive that authority, nor, most important, that Mr. Turner's letter constituted a recognition that the Union had obtained in the 1967 Standard Agreement a bar against any wage decreases for any reason whatsoever, including decreases in the wages received by the other building trades.

In sum, I am not persuaded that Mr. Turner's letter of April 11, 1967, supports the Union's position in this case. I reach this conclusion not only on the basis of the arguments already discussed, but also on the basis of the central fact that any ambiguity in that letter must be construed in light of the fact that the parties had just negotiated a new contractual provision dealing with credit for NEII fringe benefit increases in the application of the Atlantic City formula. It is entirely natural that there should have been uncertainties about the application

of that credit, and that some of those uncertainties should have been addressed by the Employers. Conversely, there is no credible evidence, apart from whatever ambiguities may lurk in Mr. Turner's letter, that the parties had contemplated or discussed the possibility of wage decreases in the other building trades, and the effect such decreases would have on the wages of the elevator constructors under the revised Atlantic City plan. Hence, the most plausible interpretation of Mr. Turner's letter, which I accept, is that the first sentence is not to be construed apart from the remainder, and that, taken in its entirety, that letter does not support the Union's position with respect to the proper interpretation of Article V of the 1967 Agreement.

The Union's remaining arguments are equally without merit, and do not require extended discussion. The Employers' assertion in a 1970 proceeding before arbitrator Sidney Cahn that the 1967 Agreement dealt with wage increases, while previous Agreements had been based on an average wage rate concept, is irrelevant in this case. The issue before arbitrator Cahn was not the effect of a decrease in the wage rates of other trades, and the Employers' reference to the 1967 Agreement as dealing with wage increases can hardly be taken as an expression of their understanding as to the effect of decreases.

The decision of arbitrator Charles La Cugna in *Hecla Mining Co. and USWA, Local 5114,* 81 L.A. 193 (1983), is similarly unpersuasive. In that case, the arbitrator, though purporting not to examine bargaining history, or the intent of the parties, noted that the parties, at the time they signed their contract, "were well aware of the significance and meaning of the now disputed contract language" (Id. at 194). As I have already noted, that is most emphatically not true in the instant case.

Appendix H

Indeed, it is the history of the parties' negotiations upon which the decision in this case as to the proper interpretation of Article V squarely rests. If one were to look solely at the language of Article V, the Union might well prevail (despite the arguable ambiguity caused by the absence of a specific prohibition on wage decreases). It would, however, be inappropriate for an arbitrator, charged with the duty of contract interpretation, to look solely at the language of the contract, and to ignore other indicators of the parties' intent, if such indicators exist. To be sure, the clearer the language of the contract itself, the greater is the burden on the party asserting that the contract should be interpreted in a manner contrary to that language. In the instant case, however, regardless of how substantial the burden of proof that is placed on the Employers, they have sustained that burden. The bargaining history of the 1967 Agreement proves beyond any substantial doubt that the change in the language of the Atlantic City formula did not represent the existence of a mutual intent to deprive the Employers of the power that they had for forty-five years under the original Atlantic City formula to decrease the wages of elevator constructors based upon decreases in the wages of the Atlantic City Plan building trades. In the absence of any indication by the Union that it sought to deprive the employers of that power, the Employers were warranted in assuming that such power continued to exist, and the Union, which caused that assumption, is bound by it.[9]

The Union's final argument is that by decreasing wages without Union consent the Employers violated Article V,

---

9. In that sense, there was mutual intent with respect to the Employers' power to decrease wages. Hence, there is no merit to the Union's alternative argument that the Employers' act of decreasing wages constituted unilateral action in violation of section 8(a)(5) of the Labor Act.

Paragraph 6 of the Standard Agreement. This argument, too, is without merit. The power of either party to demand a change in wage rates at the appropriate times existed under the original Atlantic City Plan, as embodied in Article V, Paragraph 3 of the 1962 Agreement (carried forward as Article V, Paragraph 2), and the addition of Paragraph 6 was not intended to deprive them of that power. Indeed, a contrary interpretation of these paragraphs, requiring mutual consent to change wages, would effectively deprive the Employers of precisely that power which the bargaining history of Article V shows they were intended to have—to decrease wages based upon the decreased wages of other trades. For, if mutual consent to change wage rates were necessary, the Union could block wage decreases based upon wage decreases of other trades by refusing to give its consent. Thus, Article V, Paragraph 6 may not reasonably be interpreted to require Union consent to the Employers' exercise of their Article V, Paragraph 3 power to change wage rates unilaterally at the appropriate time.[10]

Award

The grievance is denied.

s/ S.B. Goldberg
Stephen B. Goldberg
Arbitrator

Chicago, Illinois
April 23, 1984

---

10. This conclusion does not render Article V, Paragraph 6 meaningless. As Mr. Treadway testified, the purpose of that paragraph is to enable the Union and the Employers to impose a wage rate change on a protesting Local if they jointly conclude that such a change is necessary to protect the fringe benefit funds.

APPENDIX I—EXHIBIT F TO FOREGOING AFFIDAVIT--JUDGMENT OF GOETTEL, J. DATED SEPTEMBER 12, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

83 CIV 6064
Goettel, J.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO

Plaintiff,

vs.

NATIONAL ELEVATOR INDUSTRY, INC.,

Defendant.

This cause came on to be heard on the motion of the defendant for an order confirming the arbitration award issued by arbitrator Stephen B. Goldberg on April 13, 1984, and for summary judgment in this action based upon said arbitration award and on the cross motion of the plaintiff for an order vacating said arbitration award and for summary judgment in this action on the grounds that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law, and the Court having considered the pleadings, affidavits, exhibits and Rule 3(g) statements heretofore filed by the parties and the oral argument of the parties at the hearing held before the Court on June 8, 1984, and the Court having filed its opinion in this action on August 29, 1984,

Appendix I

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED that

1. Plaintiff's motion to vacate said arbitration award be and hereby is DENIED.

2. Plaintiff's motion for summary judgment in this action be and hereby is DENIED.

3. Defendant's motion to confirm said arbitration award be and hereby is GRANTED.

4. Because said arbitration award has been confirmed the plaintiff's complaint be and hereby is DISMISSED.

Dated: New York, N.Y.

s/ Gerard L. Goettel
U. S. D. J.

APPENDIX J—EXHIBIT G TO FOREGOING AFFIDAVIT--OPINION OF THE SECOND CIRCUIT FILED FEBRUARY 19, 1985

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of February, one thousand nine hundred and eighty-five.

PRESENT:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE WILLIAM H. TIMBERS,

HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

84-7830

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Plaintiff-Appellant,

-against-

NATIONAL ELEVATOR INDUSTRY, INC.,

Defendant-Appellee.

Appendix J

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED substantially for the reasons stated in the opinion of Judge Goettel dated August 29, 1984.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Wm. H. Timbers
WILLIAM H. TIMBERS

s/ Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX K—SUPPLEMENTAL AFFIDAVIT OF E. JAMES WALKER, JR., SWORN TO NOVEMBER 23, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-5315

NATIONAL ELEVATOR INDUSTRY, INC.,

Plaintiff,

against

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Defendant.

Supplementary Affidavit; In Support of Plaintiff's Motion for Permanent Stay of Arbitration; In Opposition To Defendant's Motion For Summary Judgment; And In Support of Plaintiff's Cross-Motion For Summary Judgment

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

E. James Walker, Jr., being duly sworn, deposes and says:

1. I am the Manager of Labor Relations of Plaintiff, National Elevator Industry, Inc. ("NEII"). I submit this affidavit to supplement my affidavits dated September 10, 1985 and October

Appendix K

18, 1985, because I wish to bring to the Court's attention certain additional facts which demonstrate that the position now taken by the International Union of Elevator Constructors ("IUEC") on its motion for summary judgment is inconsistent with the IUEC's position in the arbitration proceeding relevant herein and in previous litigation in the United States District Court for the Southern District of New York; the United States Court of Appeals for the Second Circuit and the United States Supreme Court.

2. The IUEC takes the position that it should be permitted to relitigate the same issue that was decided by Arbitrator Goldberg on the basis that Arbitrator Goldberg's decision and award only relate to the wage reduction implemented in Cedar Rapids, Iowa. As will be shown below, the issue decided by Arbitrator Goldberg was a broad issue of contract interpretation, which the IUEC put before the arbitrator to resolve. That issue was the computation of wage reductions not only in Cedar Rapids, but in every other locality covered by the Standard Agreement.

3. In my affidavit dated September 10, 1985, I set forth several facts bearing upon this issue, none of which facts are disputed by the IUEC. These facts may be summarized as follows:

A) The Standard Agreement is a nationwide collective bargaining agreement;

B) The Standard Agreement contains a wage formula which is intended to be applied on a uniform nationwide basis, although the mathematical results of the wage formula may differ from one local union to another;

C) When in August, 1983, NEII notified the IUEC

of NEII's intention to reduce the wage rate of the elevator constructors in Cedar Rapids, Iowa, the IUEC brought an action in federal court for a temporary and permanent injunction aqainst wage reductions for elevator constructors *anywhere in the United States*. The IUEC's action in this regard was ultimately dismissed because of the Goldberg decision and award. At no point in the lengthy proceedings did the IUEC argue to the District Court, the Court of Appeals for the Second Circuit or the Supreme Court that the Goldberg award was not determinative of the IUEC's action for a permanent injunction against wage reductions anywhere in the United States. On the contrary, as shown below, the IUEC argued to each court that the Goldberg award should be overturned precisely because of its all-embracing effect upon "thousands" of IUEC members throughout the United States;

D) As wage rate reductions occurred in cities other than Cedar Rapids, Iowa, such as Grand Rapids, Michigan, Portland, Oregon, Mobile, Alabama, Wichita, Kansas, Peoria, Illinois, Kalamazoo, Michigan, Duluth, Minnesota, Jackson, Mississippi, and Houston, Texas, the IUEC protested the wage reductions in letters to NEII stating that: "[T]his *issue* is now being resolved in the courts." * * * "The pending arbitration on October 25, 1983, in Chicago will resoive this *issue* and the decision in that case will govern the wage determination for Local 42 (Grand Rapids, Michigan)" * * * "As you are aware, this issue

is now being resolved in the courts. We believe it would be improper for NEII to implement such a change (in Mobile, Alabama) at this time and we urge NEII to hold up doing so pending a decision from the court." (*See* Exhibit J to my affidavit of September 10, 1985, emphasis added.)

4. In addition to the facts summarized in paragraph 3 above, I wish to bring the following to the Court's attention:

A) At the arbitration hearing held on October 25, 1983, the IUEC made clear in its opening statement that the issue before the arbitrator was not limited to Cedar Rapids, Iowa but rather applied to wage reductions anywhere.

"Now, when the Union first learned of the Companies' intention to go ahead with this decrease—and, by the way, this is the first time we know of in the history of this sixty-year bargaining history that they have done this—naturally the Union was incensed. They felt that NEII's action was totally improper, and we took the initial step, something we have never done before, we went into Federal Court to try to enjoin the implementation of this wage decrease pending a decision by you, pending a decision in arbitration. In effect, we tried to get a reverse *Boys Markets* injunction. It is usually the employers who try to get a strike injunction pending arbitration.

Appendix K

"We went into Federal Court in New York. We did not get the injunction. The court studiously avoided reaching the merits. In fact, the court wanted no part of getting into these wage formulas and their history. The basis for the court's denial, and I am sure Mr. Strahley will confirm this, was simply that in the court's opinion we were not suffering any irreparable harm. The court reasoned that you, as Arbitrator, were more than sufficiently empowered to make us whole for any wrong that we were done by the employers; that it was simply a matter of money, and you could make us whole by back wages, and for that reason there was no irreparable harm and no reason for the extraordinary relief of an injunction.

"This really doesn't bear on the merits of this case, but I want you to be fully informed of everything that has happened.

"*Since we filed the suit, and since this case has come about, it is my understanding that NEII is trying the same thing, and has gone ahead, in fact, in another area of the country—I believe, Grand Rapids, Michigan—so the case today is not limited in its particulars to this wage decrease in Cedar Rapids, Iowa. Our lawsuit was not limited to the decrease in Iowa. We were just attacking this action of NEII's in implementing these wage decreases anywhere.*

"What we are asking you to do, first of all, is to declare the Companies' actions as totally

improper and in violation of the Standard Agreement. Secondly, we want you to issue an order ordering the Companies to make our men whole, to pay them back wages for all these monies that have been improperly withheld from them under the wage formula, with interest." (Transcript of Arbitration Proceeding dated October 25, 1983, opening statement by IUEC counsel at pp. 18-19, [emphasis added]—copies of the relevant pages of the transcript are annexed hereto as Exhibit "A".

B) The IUEC submitted a post hearing brief to Arbitrator Goldberg in which the IUEC emphatically set forth its position that the IUEC was seeking an award which would prohibit NEII from implementing wage decreases anywhere in the United States, in the following language:

> "Since filing of the suit, NEII is going ahead with the same thing in many other areas of the country. *Thus, the case is not limited in its particulars to this wage decrease in Cedar Rapids, Iowa. The union is attacking this action of NEII in implementing these improper wage decreases anywhere.*
>
> "What the union is asking the Arbitrator to do, first of all, is to declare the companies' actions to be improper and in violation of the Standard Agreement. Secondly, the Union seeks an order requiring the companies to make its members whole, in the form of back wages, with interest, for all monies that have

been improperly withheld from them under the wage formula, as in Cedar Rapids, *wherever that has occurred.*" (IUEC's brief to Arbitrator Goldberg at p. 14 [emphasis added]—copies of the relevant pages are annexed hereto as Exhibit "B".)

It is significant that the IUEC expressly divided its demand for relief into two separate categories: (1) a declaration by the arbitrator that wage decreases are improper under the Standard Agreement and (2) an award of back pay for *all* union members, whether in Cedar Rapids or anywhere else. Arbitrator Goldberg expessly ruled on the IUEC's first demand, a demand for a declaration of the meaning of the Standard Agreement by holding that wage decreases are permitted under the Standard Agreement. By implication, Arbitrator Goldberg also ruled on the IUEC's second demand, since no backpay is appropriate where the Standard Agreement permits wage reductions.

The conclusion of the IUEC's brief to Arbitrator Goldberg reemphasizes the fact that the arbitration deals with a broad question of contract interpretation, not limited to Cedar Rapids, but applicable to any attempt by NEII to reduce wages:

"Conclusion"

"For all the above reasons, the grievance should be sustained. The Arbitrator should declare the companies' act of implementing

wage reductions beyond those permitted for the fringe credits to be in violation of the Standard Agreement. The companies should be ordered to make their employees whole for any improper wage reductions to date since the date of the grievance. The Arbitrator should retain jurisdiction in the event the parties themselves are unable to fix the amounts of back wages owed." (IUEC Brief, to Arbitrator Goldberg, p. 30)

C) NEII also submitted a post hearing brief wherein NEII also argued the same broad contractual issue, whether Article V of the Standard Agreement permits NEII to implement a wage reduction. In its conclusion NEII stated:

> "The arbitrator should find:
>
> 1. That NEII has the right under Article V, paragraph 2, of the Standard Agreement, to initiate a wage rate change.
>
> 2. That under the Atlantic City formula the wage rate of the elevator constructor may be reduced based upon the average wage rate of the four highest trades." (NEII's brief to Arbitrator Goldberg, p. 59, a copy of the relevant page is annexed hereto as Exhibit "C")

D) After the Goldberg award was issued, the IUEC moved in the District Court for the Southern District of New York for leave to file an amended

complaint against NEII, which amended complaint sought an order vacating Goldberg's award and, like the IUEC's initial complaint, also sought a temporary and permanent injunction against wage decreases *anywhere in the United States*. Thus, both before and after the issuance of the Goldberg award, the IUEC was seeking a broad nationwide injunction against wage decreases. Moreover, the IUEC did not request Judge Goettel to remand the case to a second arbitrator. Rather, the IUEC requested that Judge Goettel vacate Arbitrator Goldberg's award *and then decide the issue himself*. The District Court denied the IUEC motion to vacate the award and dismissed the IUEC's complaint, "because said arbitration award has been confirmed." Thus, Judge Goettel dismissed the plenary action brought by the IUEC for broad injunctive relief against wage decreases anywhere in the United States on the basis of Arbitrator Goldberg's award. Judge Goettel obviously regarded the award as determinative of the IUEC's broad request for injunctive relief in the IUEC's plenary action before him.

B) At page 2 of the IUEC's brief to the Second Circuit, the IUEC set forth the "Issue Presented" as follows:

"ISSUES PRESENTED

> "Whether an arbitration award permitting employers to implement a mid-term decrease in employee wages of more than

two dollars per hour can be said to "draw its essence" from a collective bargaining agreement specificially providing only for an "increase" in wages during the term of the agreement?"

The entire thrust of the IUEC's brief to the Second Circuit (which is submitted herewith as Exhibit D) is that Arbitrator Goldberg erred in construing the wage formula, a formula which is admittedly intended to be applied on a national basis. At pages 17 and 18 of its brief to the Second Circuit the IUEC summarizes its position that (1) Arbitrator Goldberg erred in "*construing the industry's national collective bargaining agreement*" and that (2) the impact of this alleged error "is now being felt by Union members *throughout the United States.*"

F) The IUEC's petition for certiorari to the United States Supreme Court is annexed to my affidavit dated September 10, 1985, as Exhibit H. At page (i) of this petition, the IUEC sets forth its statement of the "Question Presented" in broad terms which make clear that, in the IUEC's view, the issue is a broad issue of contract interpretation, not a holding which is limited to one relatively small city in Iowa:

"QUESTION PRESENTED

"This Court has held that a labor arbitration award is legitimate only so long as it 'draws its essence' from the parties'

collective bargaining agreement. The question presented is whether an arbitration award that construed contractual language to mean its very opposite—i.e., that permitted employer to implement decreases in employee wages when the agreement provided only for wage increases—must be vacated under that standard of review." (IUEC Petition to Supreme Court, p. (i))

The IUEC's petition to the Supreme Court emphasizes that the Standard Agreement is a "nationwide" collective bargaining agreement (*See*, page 2 thereof). The IUEC states that "one provision of the Standard Agreement, Article V, sets forth a formula for determining wage rates of elevator constructors *in the Union's various locals located throughout the country*" (*See*, pages 2 and 3 thereof). Again, the IUEC's entire thrust is that Arbitrator Goldberg erred in basic contract interpretation which affected Union members throughout the United States.

> "Since the arbitration, the release of Arbitrator Goldberg's Award and the lower court proceedings, NEII has implemented wage decreases in several other local union jurisdictions. Thus, the impact of Goldberg's Award construing the industry's national collective bargaining agreement is now being felt by thousands of workers throughout the United States." IUEC Petition to Supreme Court, pages 7 and 8.)

Appendix K

5. Notwithstanding the foregoing, the IUEC now contends that the award of Arbitrator Goldberg was intended to apply only to Cedar Rapids, Iowa (*See*, IUEC Memorandum to this Court at pp. 9-10), a contention which is wholly inconsistent with what the IUEC initially stated during the arbitration hearing and reasserted in several ways in the subsequent court proceedings and in correspondence with NEII. Contrary to the IUEC's present contention, an interpretation of a wage formula is inherently prospective in that it determines the application of that formula, wherever applied. The IUEC argues that because the award reads "The grievance is denied," it should be restricted to Cedar Rapids, but the transcript of the hearing shows that the IUEC did not limit its grievance to Cedar Rapids, but instead expressly stated its grievance as a question of contract interpretation which would control the actions by NEII on a national basis. In denying the IUEC's grievance, Arbitrator Goldberg denied the IUEC'S interpretation of the Standard Agreement not only in Cedar Rapids but on a nationwide basis.

6. NEII submits that the IUEC should be estopped from taking a position in the instant litigation which is contrary to its position to the Southern District, Second Circuit and Supreme Court. Moreover, as is explained in NEII's Memorandum of Law which is submitted herewith, NEII submits that the Goldberg Award and the attendant litigation are binding upon the parties and the Court by operation of res judicata and/or collateral estoppel.

s/ E. James Walker, Jr.
E. James Walker, Jr.

Appendix K

On this 23rd day of November, 1985, before me, a notary public, came E. James Walker, to me known as the Manager of Labor Relations for National Elevator Industry, Inc., who did swear that the facts set forth in the foregoing affidavit are true to the best of his knowledge and belief.

s/ Patricia Mitchell
NOTARY PUBLIC

PATRICIA MITCHELL
Notary Public, State of New York
No. 30-4760588
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1986

APPENDIX L—EXHIBIT D TO FOREGOING SUPPLEMENTAL AFFIDAVIT–IUEC'S BRIEF TO SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 84-7830

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

PLAINTIFF—APPELLANT

-v-

NATIONAL ELEVATOR INDUSTRY, INC.,

DEFENDANT—APPELLEE

On Appeal from an Order of the United States District Court for the Southern District of New York, Confirming an Arbitration Award, Denying Plaintiff-Appellant's Motion to Vacate said Award and for Summary Judgment, and Dismissing the Complaint

---

BRIEF OF PLAINTIFF-APPELLANT
International Union of Elevator Constructors,
AFL-CIO